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Case No

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA, *Petitioner*

vs.

JAMES RABB, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE FOURTH DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the Fourth District Court of Appeal's of Florida decision in State v. Rabb, 920 So.2d 1175 (Fla. 4th DCA 2006), conflicts with Illinois v. Caballes, 543 U.S. 405, 160 L. Ed. 2d 842, 125 S. Ct. 834 (2005); United States v. Place, 462 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85, (1984) and United States v. Jacobsen, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984), by violating the Court's holdings that a canine sniff does not constitute a search because it is limited in scope and only reveals the presence or absence of contraband which does not compromise any legitimate interest in privacy?

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IN THE SUPREME COURT OF THE UNITED STATES

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TO THE SUPREME COURT OF FLORIDA

OPINION BELOW

The opinion below has been reported at State v. Rabb, 920 So. 2d 1175 (Fla. 4th DCA 2006)(Appendix A, p. 47-100).

CONSTITUTIONAL PROVISIONS

Fourth Amendment, United States Constitution:

> The right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment, United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Florida Constitution. Art. I, § 12 (2004):

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of the evidence to be obtained. **This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.**

JURISDICTION

Petitioner, State of Florida, seeks jurisdiction pursuant to 28 U.S.C. § 1257 (a) and Rule 10 of the Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

On June 23, 2004, the Fourth District Court of Appeal for the State entered the original opinion on direct appeal in State v. Rabb, (Rabb I) 881 So.2d 587 (Fla 4th DCA 2004), and on September 22, 2004, denied rehearing, rehearing *en banc*, and certification of question of great public importance. (App. A, p. 46). The timely State sought *certiorari* review before this Court, and in Florida v. Rabb, 544 U.S. 1028, 125 S. Ct. 2246, 161 L. Ed. 2d 1051 (2005), the Court vacated the decision and remanded the case to the state appellate court for further consideration in light of Illinois v. Caballes, 543 U.S. 405, 160 L. Ed. 2d 842, 125 S. Ct. 834 (2005). . The Fourth District Court of Appeal issued its substituted opinion in State v. Rabb, (Rabb II) 920 So. 2d 1175 (Fla. 4th DCA 2006), and denied rehearing, rehearing *en banc*, and certification of question of great public importance. (App. A, p. 47). The State filed a Notice to Invoke Discretionary Jurisdiction in the Florida Supreme Court on February 27, 2006, and that Court denied discretionary conflict review on June 1, 2006, State v. Rabb, Case No. SC06-417. Mandate re-issued on March 3, 2006, however, the State's Emergency Motion to Recall Mandate Pending review was granted on June 13, 2006. Petitioner now seeks *certiorari* review before this Court.

STATEMENT OF THE FACTS

The facts have not changed from the original 2002 motion to suppress proceedings. The Fourth District's review

of the facts resulting in the outcome in Rabb II, are identical to those facts which resulted in Rabb I.

Respondent filed a motion to suppress evidence contending that the warrant issued was not based upon probable cause (R. 51), thus, the information was obtained by illegal means (R. 54). At the hearing on the Motion to Suppress, Respondent argued that the dog sniffing at his front door was a search requiring a warrant (T. 21).

Evidence revealed that Detective Taranu took a police canine, Chevy, out of the vehicle and walked the dog on the street in front of Rabb's residence (T. 32). The detective went to the front of the residence (T. 32) using the same path, "that people like the mail person would take or us as officer going to the door to conduct an investigation." (T. 32, 44).

The trial court suppressed the evidence finding:

> The sole issue in this case is whether it is violative of the Fourth Amendment to conduct a dog sniff of a private residence in order to obtain probable cause for the issuance of a search warrant (copy attached). This Court, in this case of first impression in this State, finds that it does.
>
> On April 23, 2002, Detective Taranu and another detective, received information from an anonymous tipster that Defendant was growing marijuana in his home. The tipster gave Defendant's name, year of birth and stated that he is a white male. The tipster then provided that Defendant's house was located on Polk Street behind the Howard Johnson's.

The detectives located information at the property appraiser's office and went to the address of 2839 Polk Street, in Hollywood, Florida. The officers surveilled the house for about thirty minutes. Defendant exited the house and got into a Firebird that had been parked in the front of the residence. The detectives followed the car and made a traffic stop.

During the stop, a search of the car was conducted and a small amount of marijuana was located in the car and in Defendant's sock. Defendant also had some books and a video tape of marijuana cultivation in the car.

Based upon this search, Detective Taranu and his drug detector dog "Chevy" went to Defendant's residence. Taranu took Chevy to the front door of the residence where the dog alerted. Based upon this conduct, Taranu obtained a search warrant.

Defendant contends that the 'search' of his residence was unlawful and thus the affidavit in support of the search warrant was defective and all fruits of the search of his home must be suppressed.

Defendant relies upon the lone federal case condemning this type of search, United States v. Thomas, 757 F.2d 1359 (2d Cir. 1985). The Court held that the use of trained dog to sniff for narcotics outside of a defendant's apartment constituted a search that, in the absence of a warrant, violated the Fourth Amendment, thus

> rendering the information gather from the dog's alert unavailable to support the issuance of a search warrant of the apartment. This Court agrees that what Taranu did with Chevy, amounted to a search. However, the analysis does not end here. This Court is required to excise invalid allegations and determine whether independent and lawfully obtained information demonstrates probable cause. State v. Hunwick, 434 So.2d 1000 (Fla. 4th DCA 1983).
>
> Anonymous tipster's information and the limited surveillance of the residence. There was no *indicia* of a marijuana grow house, i.e., covered windows, high pedestrian traffic, higher than normal use of electricity, etc. Further, the veracity of the informant was not established in the affidavit. Lastly, the finding of a misdemeanor amount of marijuana on a Defendant driving a car on I-95 does not establish the growing of marijuana in his home.

(R. 74).

The Fourth District Court of Appeal of Florida (hereinafter "the Fourth District") affirmed the motion to suppress in State v. Rabb, 920 So. 2d 1175 (Fla. 4th DCA 2006). (Appendix A, p. 67), again holding that the use of a canine sniff at the front door of a residence constituted a search.

REASONS FOR GRANTING THE WRIT

THE FOURTH DISTRICT COURT OF APPEAL'S DECISION IN STATE v. RABB, 920 So.2d 1175 (FLA. 4TH DCA 2006), CONFLICTS WITH THIS COURT'S DECISION IN ILLINOIS v. CABALLES, 543 U.S. 405, 160 L.Ed.2d 842, 125 S.Ct. 834 (2005); UNITED STATES v. PLACE, 462 U.S. 109, 80 L.Ed.2d 85, 104 S.Ct. 1652 (1984) AND UNITED STATES v. JACOBSEN, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984), BY VIOLATING THE HOLDINGS THAT A CANINE SNIFF DOES NOT CONSTITUTE A FOURTH AMENDMENT SEARCH BECAUSE IT IS LIMITED IN SCOPE AND ONLY REVEALS THE PRESENCE OR ABSENCE OF CONTRABAND WHICH DOES NOT COMPROMISE ANY LEGITIMATE INTEREST IN PRIVACY?

As a government investigative technique, drug-dog sniffs disclose only the presence or absence of narcotics, and does not expose non-contraband items, activity, or information that would otherwise remain hidden from public view, does not intrude on a legitimate expectation of privacy and thus, is not a "search" for Fourth Amendment purposes.

On remand from this Court in Florida v. Rabb, 544 U.S. 1028, 125 S. Ct. 2246, 161 L. Ed. 2d 1051 (2005),[1] the

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[1] The decision affects a great number of persons in law enforcement concerning matters that are of considerable significance in investigating techniques. The trial court's decision was based upon constitutionally grounds and puts in jeopardy attempts by law

Fourth District Court of Appeal ignored Illinois v. Caballas, 543 U.S. 405, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005), and interpreted Kyllo v. United States, 533 U.S. 27 (2001), to hold that a canine sniff that occurs outside a front entrance of a house that is visible and accessible from the public road constitutes a search because "it is of no importance that a dog sniff provides limited information regarding only the presence or absence of contraband."[2] (Appendix A., p. 61)

This case again emphasizes the need to resolve whether canine sniffs as analyzed in United States v. Place, 462 U.S. 696 (1983) should ever be classified as a search in light of City of Indianapolis v. Edmond, 531 U.S. 32 (2000); Kyllo v. United States, 533 U.S. 27 (2001), or Illinois v. Caballes, 543 U.S. 405, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005).

In Place, the Court concluded that the canine sniff of luggage at an airport was not a search because it "discloses only the presence or absence of narcotics, a contraband item," without requiring the opening of the suitcase. The Court

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enforcement to execute its responsibility to investigate a crime by hampering its ability to use an age old investigative technique that is severely limited and narrow in scope and only reveals the presence of contraband.

[2] This Court has been consistent in granting the *writ of certiorari* in cases where there is a real conflict of opinion and authority between courts of appeals, or between a court of appeals and the highest court of a state, or between two state courts of last resort. See, e.g., Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923); Rice v. Sioux City Cemetery, 349 U.S. 70, 79 (1955). As such, Petitioner respectfully asks this Court to grant *certiorari* to resolve this conflict. See, e.g, Plumbers, Steamfitters, R. P. F. & A. v. County of Door, 359 U.S. 354, 356 (U.S., 1959)(certiorari granted to resolve conflict between the Circuit Court of Appeals).

characterized the canine sniff as "limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure." 462 U.S. at 707. Further, it was pointed out that, "despite the fact that the sniff tells the authorities something about the contents of the luggage, the ... limited disclosure ... ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods." Id. In Jacobsen, this Court concluded, that a field test of white powder seized by government agents was not a search, based on Place, (the Court analogized the field test to a dog sniff, which reveals only the presence or absence of contraband. In its view, the field test likewise did not infringe upon a legitimate expectation of privacy, 466 U.S. at 122.); and in City of Indianapolis, 531 U.S. at 40, the Court found unconstitutional a highway checkpoint program designed to discover and interdict illegal narcotics, concluded the program's use of dogs to sniff the outside of automobiles was constitutional.

In Caballes, the Court determined that a drug dog's sniff of the exterior of an automobile that had been lawfully stopped for speeding did not "implicate legitimate privacy interests," because the sniff revealed only the "location of a substance that no individual has a right to possess," therefore the scan did not violate the Fourth Amendment. 543 U.S. at 409-410. The Court reiterated its ruling in Place, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983), that a well trained narcotics detection dog does not compromise any legitimate privacy interest because it only discloses the presence or absence of contraband. The Caballes court made clear that there is no legitimate privacy interest in illegal drugs protected by the U.S. Constitution. However, the Florida state courts have steadfastly misconstrued the holdings of Place, Jacobsen, and now Caballes.

Based on an anonymous tip that Rabb was cultivating cannabis in his home, police brought a drug detector dog to the front door of the home where the dog alerted. The additional facts leading up these events were that the police obtained a search warrant for Rabb's home.[3]

Police found sixty-four cannabis plants and other evidence of a cannabis growing operation. Following his arrest for possession of cannabis, Rabb filed a motion to suppress evidence secured from the residence. That motion

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[3] On April 23, 2002, the Respondent exited the residence and drove his the 2001 Firebird north on Interstate 95. Detectives Taranu and Hyatt observed Respondent made an improper lane change while driving approximately 40 mph in a 55 mph zone. A traffic stop was initiated, and in plain view on the front seat was two cannabis cultivation books and one cannabis cultivation video. Respondent was told that detectives were conducting an investigation, however, before he was asked any question he was read his rights. When asked about the books and the video tape, he stated he was just interested in cannabis cultivation.

While, this conversation occurred, Det. Taranu and his drug detector dog, "Chevy" checked the exterior of the vehicle. As a result, "Chevy" alerted and one cannabis cigarette was recovered from the ashtray and field tested positive. Respondent was placed under arrest for cannabis and as he was about to be put in the BSO marked unit Respondent stated that he had additional cannabis inside his left shoe/sock. Two cannabis cigarettes were removed from his left sock/shoe area. The cannabis field tested positive.

Later, Det. Taranu and "Chevy" walked by the front of the residence, from the public roadway up to the front door and the dog alerted. Both Sgt. Daminao and Det. Taranu approached to the front door and stated they could smell the odor of cannabis emitting from the residence (R. 62-64).

was granted, and the trial court's ruling was upheld by the appellate court Rabb I and Rabb II, citing Kyllo v. United States. 533 U.S. 27 (2001). Although, the Fourth District, recognized the prior holdings of this Court that dog sniffs in public places [airports, or in repositories of property such as an automobile, suit-case], do not constitute a Fourth Amendment search, the appellate court concluded that when the dog sniff takes place at the front door of home, where the dog alerts to the presence of marijuana, the Fourth Amendment interests surrounding the enhanced protection of the home was enough to elevate the dog sniff into a search.

On remand the State appellate court again disregarded the rationale reaffirmed in Caballes, that the Fourth Amendment is not implicated when Government action does not "compromise any legitimate interest in privacy." 543 U.S. at 408. "[A]ny interest in possessing contraband cannot be deemed legitimate, . . . governmental conduct that only reveals the possession of contraband compromises no legitimate privacy interest." Id. (internal quotations omitted).

While courts routinely grapple with the tension between what should and should not be considered a legitimate and reasonable expectation of privacy, Place, Jacobsen and Caballes make clear that there is no reasonable and legitimate expectation of privacy in illegal contraband. Therefore whether the drug sniffing dog alerts at a wheel hub of a stopped vehicle or outside the door of a residence is of no moment if the sniff is not a search. The Rabb II decision is plainly erroneous.[4]

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[4] The Fourth District has held that the heightened privacy interest in a dwelling place renders a canine sniff intrusive on the inhabitant's expectation of privacy, even with respect to contraband. Although the state court correctly notes that Place, which upheld use of a dog sniff to search luggage at an airport, directed the focus of its

Caballes reasoned that "official conduct that does not compromise any legitimate interest in privacy is not a search subject to the Fourth Amendment," that "government conduct that only reveals the possession of contraband compromises no legitimate privacy interests," and that "the expectation that certain facts will not come to the attention of the authorities is not the same as an interest in privacy that society is prepared to consider reasonable." Caballes, 125 S.Ct. at 837-38, 160 L.Ed.2d at 847 (included quotations omitted). The Court's analysis in Caballes is consistent with its earlier decision in Kyllo that the use of thermal-imaging equipment to detect the growing of marijuana plants inside a home is an unlawful search. The Court opined that [u]nlike the canine sniff, which will not reveal non-contraband items of a private nature, thermal imaging may reveal "intimate details" within a home, such as conduct in the bedroom or bathroom. Caballes, 543 U.S. at 409-10, 160 L. Ed. 2d at 848, 125 S. Ct. at 838, citing Kyllo.

The investigative techniques employed in Kyllo was not limited to discovering the presence or absence of contraband drugs. The thing detected was that unusual amounts of heat were being generated inside the home, a phenomenon that is not itself criminal and could well have had a non-criminal explanation. The surveillance device used was a sophisticated piece of technology that revealed information, other than the presence of contraband, about the interior of Kyllo's home. Here, the dog's sniff did not explore the details of the home; the sniff revealed nothing about the residence other than the presence of marijuana, to which Rabb did not

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decision on the fact that a dog sniff was sufficiently narrow in its intrusiveness, and thus only revealed the presence or absence of illegal contraband, the court dismisses the relevance of that rationale solely because the search herein was at the front door of Rabb's home.

have a legitimate privacy expectation. The use of the drug-sniffing dog, by itself, did not encroach upon Rabb's reasonable expectation of privacy. The State court opinion in Rabb II, however perpetuates conflict with the holdings that no search occurred due to the "binary nature of the dog sniff" revealing only whether contraband was present.

Respondent below relied on United States v. Thomas, 757 F. 2d 1359 (2nd Cir. 1985) for the proposition that a canine sniff at the front door of a residence was a search under the Fourth Amendment. However Thomas logic has been rejected and criticized by other federal circuits and state courts since it clearly conflicts with the Court's determination in Place, and other pronouncements from this Court.[5] Specifically, another

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[5] Other Courts have rejected the invitation to adopt the rationale espoused in Rabb and Thomas. In United States v. Reed, 141 F.3d 644, 649-650 (6th Cir., 1998), the Sixth Circuit rejected the rationale of Thomas that Place, applied only to "public sniffs," "[a]ccording to the Thomas court, the heightened privacy interest in a dwelling place renders a canine sniff intrusive on the inhabitant's expectation of privacy, even with respect to contraband." Id. at 1366-67. However, the Court rejected Thomas opining "this holding ignores the Supreme Court's determination in Place that a person has no legitimate privacy interest in the possession of contraband, thus rendering the location of the contraband irrelevant to the Court's holding that a canine sniff does not constitute a search. Id. at 649-50.

Also, in United States v. Lingenfelter, 997 F.2d 632, 638 (9th Cir., 1993), the defendant asked the Court to adopt the Second Circuit's decision in Thomas, 757 F.2d at 1359. The Ninth Circuit noted that Thomas implied that a person has a reasonable expectation that even contraband items hidden in his dwelling place would not be revealed. However, the Ninth Circuit went on to opine that "this proposition, however, conflicts with the Supreme Court's determination that 'no legitimate expectation of privacy is impinged by governmental conduct that can 'reveal nothing about noncontraband items.'" Id. See, also, United States v. Colyer, 278 U.S. App. D.C. 367,

Florida Court in Nelson v. State, 867 So. 2d 534, 536 (Fla. 5th DCA 2004), called into question the very correctness of the Thomas decision. The Court opined "[a]s an initial matter, the very correctness of the Thomas decision is called into question by its assertion that the defendant 'had a legitimate expectation that the contents of his closed apartment would remain private.' As was shown above, the Supreme Court's analyses in Place and Jacobsen indicate that a possessor of contraband can maintain no legitimate expectation that its presence will not be revealed. No legitimate expectation of privacy is impinged by governmental conduct that can 'reveal nothing about noncontraband items.'" Id.

The instant case provides the opportunity to explain that a canine sniff of an exterior door of a residence does not

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878 F.2d 469, 475-76 (D.C. Cir. 1989)(Rejecting appellant's reliance on Thomas, 757 F.2d 1359 (2d Cir. 1985); "[a]s an initial matter, the very correctness of the Thomas decision is called into question by its assertion that the defendant "had a legitimate expectation that the contents of his closed apartment would remain private." The sniff interfered with no legitimate privacy interest because the government conduct could only reveal information with respect to contraband items and a possessor of contraband can maintain no legitimate expectation that its presence will not be revealed); United States v. Sklar, 721 F. Supp. 7, 14 (D. Mass. 1989)(the use of the canine sniff was not objectionable; even if the Court were to agree with Thomas (which it does not) that Sklar had a heightened, expectation of privacy, that expectation of privacy is not justified when it is asserted with respect to contraband); United States v. Brock, 417 F.3d 692, 695-697 (7th Cir. 2005) (Dog sniff outside defendant's locked bedroom door did not violate Fourth Amendment as no privacy interest in contraband, distinguishing Caballas from Kyllo v. United States, 533 U.S. 27, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001).

necessary constitute a search within the meaning of the Fourth Amendment.[6]

The Caballes opinion confirmed that "official conduct that does not 'compromise any legitimate interest in privacy' is not a search subject to the Fourth Amendment" 125 S. Ct. at 837. As such, Respondent had no reasonable expectation of privacy in a smell emitting from a residence and Petitioner's use of a dog on the "stoop" of a residence was a minimal intrusion, one that did not impinge upon any expectation of privacy that society is willing to accept as reasonable.

The failure of the Fourth District Court to embrace the conclusions in Caballes, Place, Jacobson, is evident, as summarized by the court as follows:

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[6] For example, in Place, the Court held that a "canine sniff" does not unreasonably intrude upon a person's reasonable expectation of privacy because "the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. 462 U.S. 696, 706-07. The majority opined that a sniff disclosed only the presence or absence of narcotics, a contraband item; and, therefore, the limited and discriminating nature of a sniff did "not constitute a 'search' within the meaning of the Fourth Amendment." Place, 462 U.S. at 707, 103 S.Ct. at 2644-45. In Jacobsen, the Court defined a Fourth Amendment search as occurring: "when an expectation of privacy that society is prepared to consider reasonable is infringed." The Jacobsen Court broadly construed Place in holding that a police investigatory tool is not a "search" if it merely reveals the presence or absence of contraband because the privacy interest in possessing contraband is not one that society recognizes as reasonable. Together, Jacobsen and Place make clear that there is no intrusion on legitimate privacy interests (and hence no "search") where the only information revealed is limited to contraband items.

> Because the smell of marijuana had its source in Rabb's house, it was an "intimate detail" of that house, no less so than the ambient temperature inside Kyllo's house. Until the United States Supreme Court indicates otherwise, we are bound to conclude that the use of a dog sniff to detect contraband inside a house does not pass constitutional muster. The dog sniff at the house in this case constitutes an illegal search.

This case presents a substantial question concerning the interplay between an individual's privacy rights and law enforcement's ability to investigate crimes. Resolution by this Court will establish a rule of law that would have a significant influence on the administration of justice and settle principles which are currently in a state of flux throughout the various trial and appellate courts.

CONCLUSION

The decision of the Fourth District Court of Appeal of Florida is erroneous, and *certiorari* review is warranted and should be granted to resolve the above conflict.

Respectfully submitted,

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STATE OF FLORIDA, Appellant, v. JAMES RABB, Appellee.

CASE NO. 4D02-5139

COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

881 So. 2d 587; 2004 Fla. App. LEXIS 8795; 29 Fla. L. Weekly D 1503

June 23, 2004, Opinion Filed

SUBSEQUENT HISTORY: Released for Publication September 22, 2004. Rehearing denied by *State v. Rabb*, 2004 Fla. App. LEXIS 15626 (Fla. Dist. Ct. App. 4th Dist., Sept. 22, 2004)

PRIOR HISTORY: Appeal of a non-final order from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Ilona M. Holmes, Judge; L.T. Case No. 02-7671CF10A.

DISPOSITION: AFFIRMED.

LexisNexis (R) Headnotes

COUNSEL: Charles J. Crist, Jr., Attorney General, Tallahassee, and Claudine M. LaFrance, Assistant Attorney General, West Palm Beach, for appellant.

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JUDGES: GUNTHER, J. FARMER, C.J., concurs. GROSS, J., dissents with opinion.

OPINION BY: GUNTHER

OPINION:

GUNTHER, J.

The State appeals the trial court order granting James Rabb's **n1** motion to suppress. James Rabb was charged with possession of Alprazolam (Xanex), possession of 3, 4-Methylenedioxymethamphetamine (MDMA), and possession of cannabis (marijuana). Rabb moved to suppress the drugs recovered from his house pursuant to a search warrant. The warrant had been issued based on a "dog sniff" at the exterior of Rabb's house by a canine trained to detect the odor of marijuana. The trial court granted Rabb's motion to suppress, and the State appeals. We affirm.

n1 The reader will notice that Rabb was referred to as John Brown in the Affidavit and Application for a Search Warrant. There is no dispute that John Brown is the same individual as James Rabb.

We take our facts directly from the Affidavit and Application for a Search Warrant:

On April 19, 2002 a source of information, who requested to remain anonymous, called the Broward Sheriff's Office and stated that a white male subject who was born in 1967, by the name of John Brown had a cannabis grow operation in his residence. The source further explained that the residence is located on Polk Street in Hollywood, behind the Howard Johnson's Hotel.

Your Affiant and Det. Taranu investigated the allegation. A check of the Broward County Property Appraisers Office revealed that John Brown owned a residence on Polk Street in the City of Hollywood, 2839 Polk Street. During the investigation John Browns vehicle, 2011 Pontiac Firebird, Fl tag, LPS485, was observed parked in front of the residence on several occasions.

On April 23, 2002 at approximately 1530 hours, Det. Taranu and your Affiant initiated surveillance on the residence. At 1600 hours a white male, identified as John Brown, exited the residence and entered the 2001 black firebird. Mr. Brown traveled West on Polk Street, cut through the Howard Johnson's parking lot to Hollywood Blvd and entered Interstate 95 North bound. Mr. Brown traveled North on Interstate 95 with Det. Taranu and your Affiant following. During the surveillance Mr. Brown made an improper lane change and was driving approximately forty miles per hour in a fifty-five mile per hour zone.

At 1610 hours a traffic stop was initiated on Mr. Brown. While Mr. Brown was changing lanes to stop in the outside emergency lane your Affiant observed him placing his hands under the drivers seat and make several overt motions. Once Mr. Brown was stopped he was asked to exit the vehicle for officer safety. While Mr. Brown was exiting the vehicle your Affiant observed two cannabis cultivation books and one cannabis cultivation video on the front drivers seat of the vehicle in plain view. Your Affiant asked Mr. Brown for his drivers license. Mr. Brown was visually nervous, hands trembling while he was locating his license.

Mr. Brown was told that detectives were conducting an investigation and before he was asked any questions your Affiant needed to read him his rights. Mr. Brown was read his rights at which time he understood his rights and agreed to

answer questions. Mr. Brown was asked if he had a cannabis grow operation inside the residence. Mr. Brown would not answer the question but stated that he was working inside the residence replacing drywall. Your Affiant then asked Mr. Brown about the books and video tape of cannabis cultivation inside the vehicle. Mr. Brown stated that he was just interested in cannabis cultivation.

While I was speaking to Mr. Brown Det. Taranu and his drug detector dog, "Chevy", checked the exterior of the vehicle. Det. Taranu's drug detector dog alerted to the exterior of the vehicle. The drug detector dog was then placed into the interior of the vehicle and alerted to the ashtray. One cannabis cigarette was recovered from the ashtray which field tested positive.

Your Affiant continued to speak with Mr. Brown who eventually stated that he wished to speak with an attorney. All questioning was terminated. Mr. Brown was advised that he under arrest for possession of cannabis and as detectives were about to place him into a BSO marked unit he stated that he had additional cannabis inside of his left shoe/sock. Two cannabis cigarettes were removed from Mr. Brown's left shoe/sock area. The cannabis field tested positive.

At 1705 hours Det. Taranu and his drug detector dog, "Chevy" walked by the front of the residence. The drug detector dog walked from the public roadway in front of the residence, up to the front door and alerted. The alert was consistent with previous alerts when narcotics were located. Furthermore, Sgt. Damiano and Det. Taranu walked to the front door of the residence and could smell the odor of cannabis emitting from the residence.

Based on the information provided by the confidential source, the cultivation of cannabis books and video's located in Mr.

Brown's vehicle, the cannabis located in Mr. Brown's vehicle as well as his person and the drug detector dog alert on the residence, your Affiant believes that a cannabis growing operation is located inside the residence.

Based on this affidavit, a search warrant was issued for Rabb's house. When law enforcement entered the house, it discovered a cannabis grow operation and sixty-four cannabis plants. Additionally, a safe was discovered containing two MDMA tablets, Alprazolam tablets, and three cannabis cigarettes. The safe also contained a key to one of the grow rooms and Rabb's Social Security card and birth certificate, which presumably identified him as James Rabb and not John Brown. Based on the evidence recovered from Rabb's house, he was charged by information with possession of the controlled substance Alprazolam, possession of the controlled substance MDMA, and possession of cannabis in an amount of twenty grams or less.

Rabb filed a motion to suppress the evidence obtained from his house, asserting that the dog sniff at the exterior of his house was an illegal search, and thus, there was no probable cause for the issuance of a search warrant for Rabb's house.

The trial court granted the motion to suppress, recognizing the question of "whether it is violative of the Fourth Amendment to conduct a dog sniff of a private residence in order to obtain probable cause for the issuance of a search warrant," to be one of first impression in Florida. It should be noted that this question was addressed in the context of the trial court's factual finding that "Taranu took Chevy to the front door of the residence where the dog alerted." **n2** Considering United States v. Thomas, 757 F.2d 1359 (2d Cir. 1985), as persuasive precedent, the trial court concluded that the use of the dog sniff of Rabb's house amounted to a warrantless search and could not support the issuance of the subsequent search

warrant for Rabb's house. The trial court then undertook to determine whether there was sufficient lawfully obtained evidence to establish probable cause to obtain a search warrant for Rabb's house without the dog sniff, and concluded that there was not where "there was no indicia of a marijuana grow house, i.e., covered windows, high pedestrian traffic, higher than normal use of electricity, etc.," the informant's veracity was not established in the affidavit, and the marijuana in Rabb's car did not establish any illegal activities in his house.

n2 The affidavit indicated that the dog alerted at the door of Rabb's residence. However, Detective Taranu testified that the dog tugged as he was walking along the street. At a motion to suppress hearing, it is properly the trial court's responsibility to weigh evidence and determine matters of credibility, such as resolving seemingly conflicting evidence. Brown v. State, 352 So. 2d 60, 61 (Fla. 4th DCA 1977).

"The standard of review applicable to a motion to suppress evidence requires that this Court defer to the trial court's factual findings but review legal conclusions de novo." Backus v. State, 864 So. 2d 1158, 1159 (Fla. 4th DCA 2003)(citing Batson v. State, 847 So. 2d 1149, 1150 (Fla. 4th DCA 2003)).

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Under the lockstep approach of Article 1, Section 12 of the Florida Constitution, the right to be free from unreasonable searches and seizures "shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court."

The question raised in this case is whether a dog sniff at the exterior of a house is a search under the Fourth Amendment. In

order to be classified as a search, law enforcement conduct must violate a "'constitutionally protected reasonable expectation of privacy.'" California v. Ciraolo, 476 U.S. 207, 211, 90 L. Ed. 2d 210, 106 S. Ct. 1809 (1986)(quoting Katz v. United States, 389 U.S. 347, 360, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967)(Harlan, J., concurring)). Furthermore, as Justice Harlan pointed out in his concurring opinion in Katz: "As the Court's opinion states, 'the Fourth Amendment protects people, not places.' The question, however, is what protection it affords those people. Generally, as here, the answer to that question requires reference to a 'place.'" Katz, 389 U.S. at 361.

When considering whether law enforcement activity at a house constitutes a search, it is necessary to consider the constitutional protections afforded a house throughout the long history of the Fourth Amendment. At the center of the Fourth Amendment stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Silverman v. United States, 365 U.S. 505, 511, 5 L. Ed. 2d 734, 81 S. Ct. 679 (1961). In fact, "the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" Payton v. New York, 445 U.S. 573, 585-586, 63 L. Ed. 2d 639, 100 S. Ct. 1371 (1980)(quoting United States v. United States District Court, 407 U.S. 297, 313, 32 L. Ed. 2d 752, 92 S. Ct. 2125 (1972)). The Fourth Amendment operates to draw "a firm line at the entrance to the house." Payton, 445 U.S. at 589.

Given the shroud of protection wrapped around a house by the Fourth Amendment, we conclude that Kyllo v. United States, 533 U.S. 27, 150 L. Ed. 2d 94, 121 S. Ct. 2038 (2001), controls the outcome of the case at bar. In Kyllo, law enforcement, believing Kyllo to be growing marijuana in his house, employed an Agema Thermovision 210 thermal imager to scan his house and reveal heat signatures. Id. at 29. The thermal scan revealed that a portion of the roof and one wall of

the house were relatively hot compared to the remainder of the house and surrounding houses. Id. at 30. As a result, law enforcement concluded that Kyllo was employing halide lamps to grow marijuana. Id. Combined with further information gathered, law enforcement obtained a warrant and discovered in excess of one hundred marijuana plants in Kyllo's house. Id. Kyllo was charged with manufacturing marijuana and moved to suppress the marijuana evidence seized from his house based on the use of the thermal imager. The trial court and appellate court determined that use of the thermal imager did not amount to a search of Kyllo's house. Id. at 30-31.

The United States Supreme Court reversed the lower courts, holding:

We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area," constitutes a search - at least where (as here) the technology in question is not in general public use.

Id. at 34. To conclude otherwise would "leave the homeowner at the mercy of advancing technology - including imaging technology that could discern all human activity in the home." Id. at 35-36. Overall:

The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained. In Silverman, for example, we made clear that any physical invasion of the structure of the home, "by even a fraction of an inch," was too much, and there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the nonintimate rug on the vestibule floor. In the home, our

cases show, all details are intimate details, because the entire area is held safe from prying government eyes.

Id. at 37 (emphasis in original). The relative warmth of Kyllo's house was deemed one of these intimate details, and it was a Fourth Amendment violation for law enforcement to employ a thermal imager to discern that intimate detail. Id. at 38.

Specifically concerning law enforcement use of dog sniffs by trained canines to detect contraband, it is true that the United States Supreme Court held in United States v. Place, 462 U.S. 696, 77 L. Ed. 2d 110, 103 S. Ct. 2637 (1983), that "the particular course of investigation that the agents intended to pursue here - exposure of respondent's luggage, which was located in a public place, to a trained canine - did not constitute a 'search' within the meaning of the Fourth Amendment." Id. at 707. The rationale for the holding is that "the sniff discloses only the presence or absence of narcotics, a contraband item." Id. at 707. In Place, the United States Supreme Court was not addressing the use of law enforcement investigatory techniques at a house, but rather only whether a dog sniff of luggage in a public airport constituted a search under the Fourth Amendment. The role of "place" in Fourth Amendment jurisprudence was instrumental in the decision in Place.

"Place" is no less key in the case at bar. We are of the view that luggage located in a public airport is quite different from a house, not only in physical attributes, but also in the historical protection granted by law. In United States v. Thomas, 757 F.2d 1359, 1366 (2d Cir. 1985), the Second Circuit compared the dog sniff of luggage in Place with that of an apartment, and concluded that "a practice that is not intrusive in a public airport may be intrusive when employed at a person's home." The rationale for this conclusion is that "the defendant had a legitimate expectation that the contents of his closed apartment

would remain private, that they could not be 'sensed' from outside his door. Use of the trained dog impermissibly intruded on that legitimate expectation." Id. 1367.

This logic is no different than that expressed in Kyllo, one of the most recent pronouncements by the United States Supreme Court on law enforcement searches of houses. Had law enforcement not brought a dog to Rabb's house, it likely would not have detected the odor of marijuana emanating from the house. Thus the use of the dog, like the use of a thermal imager, allowed law enforcement to intrude into the constitutionally protected area of Rabb's house, and such reasonably could be considered a search violative of Rabb's expectation of privacy in his retreat. Likewise, it is of no importance that a dog sniff provides limited information, because as in Kyllo, the quality or quantity of information obtained through the search is not the feared injury. Rather, it is the fact that law enforcement endeavored to obtain the information at all, or in this case, the fact that a dog's sense of smell crossed the "firm line" of Fourth Amendment protection at the door of Rabb's house. Because the smell of marijuana had its source in Rabb's house, it was an "intimate detail" of that house, no less so than the relative warmth of Kyllo's house. Therefore, until the United States Supreme Court indicates otherwise, we are bound to conclude that the use of a dog sniff to detect contraband at a house does not pass constitutional muster. The use of such a technique by law enforcement constitutes an illegal search.

Finally, we briefly address the dissent's attempt to differentiate Kyllo on the basis of the fact that it is concerned with the use of advanced technology by law enforcement. It is true that "the Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing a home on a public thoroughfare." Ciraolo, 476 U.S. at 213. However, the use of enhancement to human

senses often entails more than an unshielded glance at a house believed to obtain contraband. The use of dogs for investigation is a longstanding practice, but "the officers' use of a dog is not a mere improvement of their sense of smell, as ordinary eyeglasses improve vision, but is a significant enhancement accomplished by a different, and far superior, sensory instrument." Thomas, 757 F.2d at 1367. Likewise, "thermal imagers detect infrared radiation, which virtually all objects emit but which is not visible to the naked eye." *Kyllo*, 533 U.S. at 29. Although a drug detector dog's sense of smell may not be technology, it, like the Agema Thermovision 210, allows law enforcement to detect that which it otherwise likely would not detect. Relying on Kyllo, we conclude that although the use of such enhancement techniques to detect contraband subsequently seized by warrant may not amount to a search in a place such as a public airport, it does when intruding into a house to discern "intimate details." See Payton, 445 U.S. at 586-587 n.24.

Before turning to the issue of whether there was yet probable cause to support the issuance of a search warrant for Rabb's house based on independent lawful evidence, we briefly address the dissent's assertion that our opinion directly conflicts with Nelson v. Florida, 867 So. 2d 534 (Fla. 5th DCA 2004). In Nelson, the defendant checked into a Holiday Inn in Palatka, and the hotel staff reported his presence to law enforcement because he matched a profile of drug dealers who used the hotel as a point of sale. Id. at 535. Law enforcement then used a trained canine to walk the halls of the hotel and perform drug sniffs of each door. Id. The canine alerted to the defendant's door, and law enforcement found cocaine inside the room. Id. The defendant filed a motion to suppress alleging that law enforcement violated the Fourth Amendment by employing "a sensory enhancing animal that was unable to detect contraband until it was within eighteen inches to three

feet of the lower door jamb" of the hotel room. Id. The trial court denied the motion and the Fifth District affirmed. Id.

The court's rationale in Nelson is as follows. Despite the fact that hotel rooms are constitutionally-protected areas, individuals do not have a reasonable expectation of privacy in public areas outside a hotel room, such as hallways. Id. (citing Brant v. State, 349 So. 2d 674 (Fla. 2d DCA 1977)). The court then went on to reject the defendant's Fourth Amendment argument and United States v. Thomas, 757 F.2d 1359 (2d Cir. 1985). Nelson, 867 So. 2d at 536-537. In so doing, the court cited federal precedent holding, *inter alia*:

"The fact that a dog, as odor detector, is more skilled than a human does not render the dog's sniff illegal. Just as evidence in the plain view of an officer may be searched without a warrant, evidence in the plain smell may be detected without a warrant."

Id. at 537 (quoting United States v. Roby, 122 F.3d 1120, 1124-1125 (8th Cir. 1997)(internal citations omitted)).

For two main reasons, we conclude that Nelson neither controls nor conflicts with our decision in this case holding the dog sniff of Rabb's house to be violative of the Fourth Amendment. First, although we recognize and are in accord with the principle that "the occupants of a hotel room are entitled to the protection of the Fourth Amendment" to much the same degree as occupants of a house, this principle is not without its limitations. See Hoffa v. United States, 385 U.S. 293, 301, 17 L. Ed. 2d 374, 87 S. Ct. 408 (1966). As the Fifth Circuit **n3** stated in United States v. Jackson, 588 F.2d 1046 (5th Cir. 1978):

Despite the fact that an individual's Fourth Amendment rights do not evaporate when he rents a motel room, the extent of the

privacy he is entitled to reasonably expect may very well diminish. For although a motel room shares many of the attributes of privacy of a home, it also possesses many features which distinguish it from a private residence: "A private home is quite different from a place of business or a motel cabin. A home owner or tenant has the exclusive enjoyment of his home, his garage, his barn or other buildings, and also the area under his home. But a transient occupant of a motel room must share corridors, sidewalks, yards, and trees with the other occupants. Granted that a tenant has standing to protect the room he occupies, there is nevertheless an element of public or shared property in motel surroundings that is entirely lacking in the enjoyment of one's home."

Id. at 1052 (quoting Marullo v. United States, 328 F.2d 361, 363 (5th Cir. 1964)).

n3 This Fifth Circuit decision rendered prior to the October 1, 1981 circuit split is binding precedent for the Eleventh Circuit. See United States v. Zuniga-Salinas, 952 F.2d 876, 878 (5th Cir. 1992).

Put very simply, a hotel room may be nearly identical to a house for Fourth Amendment purposes, but a hotel room is not a house, as it is neither as private nor as sacrosanct. As a result, the fact that the Fifth District held that a trained canine's dog sniff of a hotel room does not violate the Fourth Amendment because the hotel corridor is a public area, does not conflict with our conclusion that the dog sniff of a private house, such as Rabb's, violates the Fourth Amendment. This is so for the same reasons of "place" discussed above when determining that Place is not dispositive of this case, as it addressed public airports rather than private houses.

Furthermore, the distinction between unaided and technologically-enhanced surveillance is not one without a

difference. The Fourth Amendment "protects conversations that cannot be heard except by means of artificial enhancement." United States v. Mankani, 738 F.2d 538, 543 (2d Cir. 1984)(citation omitted). The Second Circuit explained the rationale behind this rule:

The reason for this is evident. The risk of being overheard is a given in modern life, and any time people speak to one another they necessarily assume that risk. "But as soon as electronic surveillance comes into play, the risk changes crucially. There is no security from that kind of eavesdropping, no way of mitigating the risk, and so not even a residuum of true privacy." Absent a warrant, this kind of investigative intrusion bypasses the safeguards of a neutral magistrate's predetermination of probable cause.
Id. at 543 (internal citations omitted).

Because of the similarities drawn earlier in this opinion between the use of the thermal imager in Kyllo and the dog sniff in Rabb's case, it would be difficult to posit that the rationale of Mankani does not apply to Rabb's case. The risk of flowers growing in one's house being smelled by the neighbors may be a "given in modern life," but there is no way to mitigate the risk of using dog sniffs where law enforcement unaided would be unable to smell illegal drugs growing in a house. Just like an individual would never be able to soften his voice enough to mitigate the risk of intrusive surveillance, he would never be able to soften the smells of his house enough to avoid detection by the ultra-sensitive noses of dogs. To reach any other conclusion recalls the disturbing use of robot-spiders (an emblem blending both the technological advances of Kyllo and the animal senses of Rabb) to detect fugitives who softened their identities by retinal transplantation in Minority Report (Dreamworks 2002), or similar scenarios in virtually any other dystopic science fiction film. After all, the fact that conduct in a house, such as

growing marijuana, is not constitutionally protected, does not mitigate the Fourth Amendment violation that occurs where law enforcement uses sensory enhancement to intrude across the "firm line" at the door of a house and into its "intimate details." As a result, the Fifth District's decision in Nelson is not dispositive of this case or in conflict with this case.

Now that we have concluded that law enforcement's use of a dog sniff at Rabb's door constituted an unreasonable and illegal search, we must consider what impact the illegality of the search has on the validity of the subsequent search warrant for Rabb's house. It is axiomatic that evidence resulting from an illegal search, such as a dog sniff of a house, cannot be the basis of probable cause supporting a subsequent search warrant. See State v. Morsman, 394 So. 2d 408, 410 (Fla. 1981)(citing Purcell v. State, 325 So. 2d 83 (Fla. 1st DCA 1976)). Additionally, for the reasons stated by the trial court, we do not believe than any of the independent and lawfully obtained evidence in this case establishes the probable cause necessary to support a warrant. See Hunwick v. State, 434 So. 2d 1000, 1001 (Fla. 4th DCA 1983). Therefore, the issuance of the search warrant for Rabb's house was in error, because the warrant was tainted by the dog sniff and unredeemed by independent lawful evidence. Consequently, the evidence obtained from the search of Rabb's house was "fruit of the poisonous tree" subject to suppression by the trial court. See Wong Sun v. United States, 371 U.S. 471, 484-485, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963).

In sum, we hold that the trial court did not err by granting Rabb's motion to suppress where the marijuana seized was initially discovered by a dog sniff at the exterior of his house. Based on the reasonable expectation of privacy recognized by both law and society to be associated with a house, law enforcement's use of the dog sniff without a warrant constituted a search that was not permitted by the Fourth

Amendment. Furthermore, absent the dog sniff, there was no independent lawful evidence establishing probable cause to issue a warrant, irremediably tainting the evidence obtained by the search of Rabb's house based on an invalid warrant. As a result, we affirm.

AFFIRMED.

FARMER, C.J., concurs.

GROSS, J., dissents with opinion.

DISSENT BY: GROSS

DISSENT:

GROSS, J., dissenting.

A dog is a dog wherever it may wander. Moving a dog from a kennel to a litter box does not make it a cat.

Similarly, if the United States Supreme Court has held that a dog sniff of luggage in a public place, such as an airport, is not a search, then a dog sniff to detect contraband is not a search from another place that is also open to the public. For reasons explained more fully below, I would reverse.

The state appeals an order granting a motion to suppress contraband seized from a private residence pursuant to a search warrant. The basis for the warrant was a dog's alert to the presence of drugs inside a residence. The circuit court characterizes the dog sniff as a search under the Fourth Amendment.

This characterization is incorrect. Article I, Section 12 of the Florida Constitution requires that the right against unreasonable searches and seizures "be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." Art. 1, § 12, Fla. Const.; see Jones v. State, 648 So. 2d 669, 674 (Fla. 1994); Maulden v. State, 617 So. 2d 298, 300 n.2 (Fla. 1993) (quoting Art. I, § 12, Fla. Const.).

The United States Supreme Court precedent compels the conclusion that the dog sniff was not an illegal search and that it provided probable cause to obtain the search warrant.

Facts

Appellee, James Rabb, Jr., was charged with possession of (1) Alprazolam (Xanex), (2) MDMA (commonly known as "Ecstasy"), and (3) cannabis.

The search warrant for Rabb's house was issued based on an affidavit and application for a search warrant completed by Detective Ryan Hyatt of the Broward County Sheriff's Office. The affidavit contained the following facts:

1. On April 19, 2002, the Broward County Sheriff's Office received an anonymous tip that a white male, born in 1967, named "John Brown" was growing cannabis inside his residence on Polk Street behind a Howard Johnson Hotel.

2. On April 23, 2002, Detectives Taranu and Hyatt began surveillance of the residence. At 4:00 p.m., Rabb left his residence and drove away in a black Pontiac Firebird. Following the vehicle, the detectives observed it make an improper lane change. As a result, they initiated a traffic stop.

3. Once stopped, the detectives asked Rabb to exit the car. After Rabb got out, Detective Hyatt observed two books and a videotape concerning the cultivation of marijuana located on the front driver's seat. Detective Hyatt asked for Rabb's driver's license. The officers noted that Rabb was nervous and that he located his license with "hands trembling."

4. Detective Hyatt informed Rabb that the detectives were conducting an investigation. Rabb agreed to answer questions, after the detective advised him of his Miranda rights. Detective Hyatt asked whether Rabb had a cannabis grow operation inside his residence. Rabb did not answer the question directly, but stated that he was replacing drywall in the house. When asked about the books and videotape in his vehicle, Rabb replied that "he was just interested in cannabis cultivation."

5. While Detective Hyatt was questioning Rabb, Detective Taranu walked around the Firebird with his drug detection K-9, Chevy. From the exterior, Chevy alerted to the presence of drugs inside the vehicle. When placed inside the car, Chevy alerted to the ashtray. One burnt marijuana cigarette was found in the car's ashtray. The detectives arrested Rabb for possession of cannabis. While being placed in the police vehicle, Rabb informed the detectives that he had more cannabis inside his left shoe/sock area. A search of the sock revealed two additional cannabis cigarettes.

6. At 5:05 p.m., less than an hour after the traffic stop, Detective Taranu and Chevy went to Rabb's residence. Chevy "walked by the front of the residence. [Chevy] walked from the public roadway in front of the residence, up to the front door and alerted. The alert was consistent with previous alerts when narcotics were located."

Based on the information contained in Detective Hyatt's affidavit, a judge issued a search warrant for the residence.

A few hours after the warrant issued, the officers conducted the search. The detectives unlocked Rabb's residence with keys seized from his Firebird. Using the same set of keys, the detectives opened a locked room containing twenty cannabis plants, four fans, one carbon dioxide tank, a dehumidifier, and timers. Another room, which had to be broken into, contained eight cannabis plants. In a bedroom closet, the detectives located a safe containing two Ecstasy tablets, crushed Xanax pills, three cannabis cigarettes, some documents and papers containing Rabb's name, and a key that matched the lock of the broken-into "grow room." By the end of the search, detectives located four "grow rooms" containing a total of sixty-four cannabis plants.

After a hearing, the circuit court granted Rabb's motion to suppress the fruits of the search. The court held that Chevy's sniff outside of Rabb's apartment constituted a search that, in the absence of a warrant, violated the Fourth Amendment, "thus rendering the information gathered from the dog's alert unavailable to support the issuance of a search warrant of the apartment." To reach this conclusion, the court relied on United States v. Thomas, 757 F.2d 1359 (2d Cir. 1985). Disregarding the dog sniff, the court found that the other information contained in the warrant application was insufficient to justify the issuance of the warrant. **n4**

n4 The court explained:

There was no indicia of a marijuana grow house, i.e., covered windows, high pedestrian traffic, higher than normal use of electricity, etc. Further, the veracity of the informant was not established in the affidavit. Lastly, the finding of a misdemeanor amount of marijuana on a Defendant driving a car on I-95 does not establish the growing of marijuana in his home.

The Standard of Review of a Warrant Search

This is an appeal of a search conducted pursuant to a warrant. The standard of review for a warrant search is that so long as the issuing magistrate had a substantial basis for concluding that a search would uncover evidence of wrongdoing, the Fourth Amendment is satisfied. See Schmitt v. State, 590 So. 2d 404, 409 (Fla. 1991). **n5** Both at the suppression hearing and at the appellate level, a court reviewing a search pursuant to a warrant search does not undertake *de novo* review of the magistrate's probable cause determination. Rather, the reviewing court pays great deference to that conclusion. The reviewing court determines not probable cause, but only whether the issuing magistrate had a substantial basis for finding probable cause.

n5 The majority confuses the standard of review of a warrantless search after an evidentiary hearing with the standard applicable to a search conducted pursuant to a warrant issued by a magistrate.

This standard of review was emphasized in Illinois v. Gates, 462 U.S. 213, 76 L. Ed. 2d 527, 103 S. Ct. 2317 (1983), where the Supreme Court described how a reviewing court should appraise a warrant:

Similarly, we have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's "determination of probable cause should be paid great deference by reviewing courts."

Id. at 236 (citation omitted).

In Massachusetts v. Upton, 466 U.S. 727, 80 L. Ed. 2d 721, 104 S. Ct. 2085 (1984), the Supreme Court reaffirmed the Gates standard of judicial review for warrant searches:

We also emphasized that the task of a reviewing court is not to conduct a *de novo* determination of probable cause, but only to determine whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant.

Id. at 728 (emphasis added).

The Supreme Court in Upton reversed the Supreme Judicial Court of Massachusetts for having conducted a de novo probable cause determination:

The Supreme Judicial Court also erred in failing to grant any deference to the decision of the Magistrate to issue a warrant. Instead of merely deciding whether the evidence viewed as a whole provided a "substantial basis" for the Magistrate's finding of probable cause, the court conducted a de novo probable-cause determination. We rejected just such after-the-fact, de novo scrutiny in Gates.

Id. at 732-33 (emphasis added).

In this appeal, this court's inquiry is confined to the four corners of Detective Hyatt's affidavit. See Schmitt, 590 So. 2d at 409. This court must determine whether the factual allegations "created a substantial basis for concluding that probable cause existed." Id.

The Issue on Appeal

The issue at the heart of this case is whether, at the front door of a private residence that is directly accessible from the street,

a dog sniff of the odors of contraband emanating from the residence is a search under the Fourth Amendment.

The Movement of the Dog and Detective to the Front Door of the Residence did not Violate The Fourth Amendment

No Fourth Amendment violation occurred when Detective Taranu and Chevy went to the front door of Rabb's residence, which was accessible from the street. Based upon a long line of precedent, the space in front of the door enjoyed no constitutional protection.

The Fourth Amendment does not necessarily protect areas of a home which are "open and exposed to public view." State v. Duhart, 810 So. 2d 972, 973 (Fla. 4th DCA 2002); see also California v. Ciraolo, 476 U.S. 207, 213-14, 90 L. Ed. 2d 210, 106 S. Ct. 1809 (1986).

Moreover, "one does not harbor an expectation of privacy on a front porch where salesmen or visitors may appear at any time." State v. Morsman, 394 So. 2d 408, 409 (Fla. 1981); see also Fla. Dep't of Agric. & Consumer Servs. v. Haire, 836 So. 2d 1040, 1055 n.7 (Fla. 4th DCA 2003) (noting that an unfenced front yard is generally not considered protected by the Fourth Amendment due to the "lack of expectation of privacy in what is visible to the entire public"); Wysong v. State, 614 So. 2d 670, 671 (Fla. 4th DCA 1993) (finding that an "unfenced front yard was equivalent to an open field through which the officer passed to get to the threshold front door"); Koehler v. State, 444 So. 2d 1032, 1033 (Fla. 1st DCA 1984) (determining that an unenclosed front porch is unprotected by the Fourth Amendment); State v. Detlefson, 335 So. 2d 371, 372 (Fla. 1st DCA 1976) ("It cannot be said that defendant had a reasonable expectation of privacy in the

front porch of his home where, presumably, delivery men and others were free to observe the plants thereon.").

A police officer, in the scope of his duties, may approach and knock on a suspect's front door in an attempt to speak to the suspect. See Potts v. Johnson, 654 So. 2d 596, 599 (Fla. 3d DCA 1995).

Here, the front door of the residence was on a direct path from the public street, about twenty or thirty feet in. Thus, there was no constitutional violation when Chevy stood at the front door of the residence for his sniff.

Under United States v. Place, a Dog Sniff of Contraband is Not a Fourth Amendment Search

Having determined that Chevy stood on constitutionally unprotected ground, the next question is whether the dog's smelling of the odor of contraband wafting from the residence constituted a search.

In United States v. Place, 462 U.S. 696, 77 L. Ed. 2d 110, 103 S. Ct. 2637 (1983), the Supreme Court held that a canine sniff of the contents of closed luggage was not a Fourth Amendment "search." The Court wrote:

The purpose for which respondent's luggage was seized, of course, was to arrange its exposure to a narcotics detection dog. Obviously, if this investigative procedure is itself a search requiring probable cause, the initial seizure of respondent's luggage for the purpose of subjecting it to the sniff test--no matter how brief--could not be justified on less than probable cause.

Id. at 706.

The Supreme Court's holding in Place was clear that the canine sniff was not a "search."

We conclude that the particular course of investigation that the agents intended to pursue here--exposure of respondent's luggage, which was located in a public place, to a trained canine--did not constitute a "search" within the meaning of the Fourth Amendment.

Id. at 707.

Central to the Supreme Court's conclusion that a canine sniff was not a search was its uniquely narrow scope:

[T]he sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. . . .

In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure.

Id. The Supreme Court's recognition that a dog sniff is "*sui generis*" makes that investigative technique unique in Fourth Amendment jurisprudence.

The majority misreads Place when it asserts that "the role of 'place' in Fourth Amendment jurisprudence was instrumental in the decision in Place." The majority suggests that a constitutional violation occurred here because "law enforcement endeavored to obtain the information at all."

However, based on the cases cited above, there is no legal distinction between officers in an airport with the suspect's luggage, as in Place, and the officers and dog at the front door of Rabb's residence in this case. The Fourth Amendment did not preclude the officers in either case from being where they were when the canine sniff took place.

Decided a year after Place, United States v. Jacobsen, 466 U.S. 109, 80 L. Ed. 2d 85, 104 S. Ct. 1652 (1984), provided a fuller rationale for why a narrowly focused investigative technique, one that reveals only the presence or absence of contraband, is not a Fourth Amendment "search."

Jacobsen pointed out that the Fourth Amendment provides protection against "unreasonable searches and seizures." The Supreme Court defined a Fourth Amendment search: a "'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *Id.* at 113.

In Jacobsen, government agents had seized some white powder belonging to the defendants. They subjected a sample of that powder to a field test for cocaine. The issue before the Supreme Court was whether the field test of the defendants' property constituted a "search." The field test infringed on the defendants' subjective expectation of privacy. However, the Supreme Court identified the critical issue as being whether that expectation of privacy was one that "society is prepared to recognize as reasonable." *Id.* at 122. Jacobsen characterized a protected expectation of privacy as one that is "legitimate":

A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy. . . . It is probably safe to assume that virtually all of the tests conducted under circumstances comparable to those disclosed by this record would result in a positive finding; in such cases, no legitimate interest has been

compromised. . . . Congress has decided--and there is no question about its power to do so--to treat the interest in "privately" possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine, and no other arguably "private" fact, compromises no legitimate privacy interest.

Id. at 123. The Supreme Court observed that its holding in Jacobsen was "dictated" by its ruling in Place; the Court referred to Place's holding that "a 'sniff test' by a trained narcotics detection dog was not a 'search' within the meaning of the Fourth Amendment." 466 U.S. at 123.

Following the holdings of Place and Jacobsen, Florida courts have held that a canine sniff for contraband does not constitute a Fourth Amendment search. For example, a dog sniff of a vehicle has been held permissible because "its limited scope and method of investigation does not constitute a search." Flowers v. State, 755 So. 2d 708, 710 (Fla. 4th DCA 1999) (quoting Daniels v. Cochran, 654 So. 2d 609, 613 (Fla. 4th DCA 1995)); Castro v. State, 755 So. 2d 657, 659 (Fla. 4th DCA 1999). "Just as no police officer need close his eyes to contraband in plain view, no police officer armed with a sniff dog need ignore the olfactory essence of illegality." State v. Hill, 770 So. 2d 280, 282 (Fla. 5th DCA 2000). Furthermore, Florida courts have held that a drug dog alert of a vehicle provides probable cause for a search. See Bain v. State, 839 So. 2d 739, 740 (Fla. 4th DCA 2003); Hill, 770 So. 2d at 282; State v. Robinson, 756 So. 2d 249, 250-51 (Fla. 5th DCA 2000). **n6**

n6 This was not a case where there was a challenge below to the skill, training, or competence of the drug detecting dog. See Matheson v. State, 870 So. 2d 8 (Fla. 2d DCA 2003); State v. Foster, 390 So. 2d 469, 470 (Fla. 3d DCA 1980) (addressing factors to consider to determine whether a drug dog alert is

sufficient for probable cause: "the exact training the detector dog has received; the standards or criteria employed in selecting dogs for marijuana detection training; the standards the dog was required to meet to successfully complete his training program; the "track record" of the dog up until the search (emphasis must be placed on the amount of false alerts or mistakes the dog has furnished).") (quoting Max A. Hansen, United States v. Solis, *Have the Government's Supersniffers Come Down with a Case of Constitutional Nasal Congestion*?, 13 SAN DIEGO L. REV. 410, 416 (1976)).

The majority fails to grasp the importance of the two concepts central to Place and Jacobsen. There is no legitimate expectation of privacy in the odor of contraband; a trained dog will alert only to contraband, and not to odors or other things for which a Fourth Amendment protection exists. Its misunderstanding is evident from the statement that the "dog's sense of smell crossed the 'firm line' of Fourth Amendment protection at the door of Rabb's house." It was the constitutionally unprotected odor of contraband that crossed the threshold of the home to the dog's nose, which sniffed from a place open to the public.

The Holding of United States v. Place Controls This Case Even Though the Dog Sniff Occurred at a Private Residence

The next question is whether this case differs from Place and the cases cited above because it involves not luggage or a vehicle, but a canine sniff at the front door of Rabb's home.

It is true that individuals are afforded a greater expectation of privacy in their home as compared to a vehicle. See State v. McLeod, 664 So. 2d 983, 985 (Fla. 4th DCA 1995). However, as Judge Charles Moylan has succinctly written:

The higher level of justification required to satisfy the Fourth Amendment when it applies . . . is not to be confused with the very different issue of whether the amendment applies. Even the enhanced protection of the home is still limited to being a protection against "unreasonable searches and seizures." It is not a protection against non-searches and non-seizures, reasonable or unreasonable. Fitzgerald v. State, 153 Md. App. 601, 837 A.2d 989, 1030 (Md. Ct. Spec. App. 2003), cert. granted, 846 A.2d 401 (Md. 2004).

Even though Place and the Florida cases did not involve a dog sniff at a residence, "the rationale of *Place* and of *Jacobsen* . . . had absolutely nothing to do with the locus either 1) of where the dog sniffing took place or 2) of where the subjective expectation of privacy was being entertained." *Id.* As Judge Moylan has observed:

The *raison d'etre* for treating a dog sniff as a non-search is that the binary nature of its inquiry, "contraband 'yea' or 'nay'?," precludes the possibility of infringing any expectation of privacy that society objectively considers to be legitimate. If the possession of narcotics in an automobile or a suitcase is illegitimate, so too is the possession of narcotics in a home. It is the criminal nature of the possession itself that takes the activity out from under the protection of the Fourth Amendment, not the place where the possession occurs.

Id.

The majority and the circuit court have relied on Thomas as authority to find the dog sniff a search under the Fourth Amendment. In Thomas, the second circuit held that a dog sniff of odors emanating from a residential apartment constituted a Fourth Amendment search. The court distinguished Place, reasoning that:

Here the defendant had a legitimate expectation that the contents of his closed apartment would remain private, that they could not be "sensed" from outside his door. Use of the trained dog impermissibly intruded on that legitimate expectation. The Supreme Court in *Place* found only "that the particular course of investigation that the agents intended to pursue here -- exposure of respondent's luggage, which was located in a public place, to a trained canine -- did not constitute a 'search' within the meaning of the Fourth Amendment." *Place*, 103 S. Ct. at 2644-45. Because of defendant Wheelings' heightened expectation of privacy inside his dwelling, the canine sniff at his door constituted a search.

Thomas, 757 F.2d at 1367.

The problem with Thomas is that it is unsound; the opinion "has met with the universal disapprobation of all the federal circuit and district courts that have considered it." Fitzgerald, 837 A.2d at 1031; see also United States v. Reed, 141 F.3d 644, 649-50 (6th Cir. 1998) (stating that Thomas ignored the Supreme Court's determination in Place that a person has no legitimate expectation of privacy in the possession of contraband, "thus rendering the location of the contraband irrelevant to the Court's holding that a canine sniff does not constitute a search"); United States v. Roby, 122 F.3d 1120, 1125 (8th Cir. 1997) (finding that a dog sniff of a common hotel corridor was not a search); United States v. Lingenfelter, 997 F.2d 632, 638 (9th Cir. 1993) (reasoning that Thomas conflicts with Supreme Court authority and "rests on an incorrect statement of law"); United States v. Colyer, 278 U.S. App. D.C. 367, 878 F.2d 469, 474-76 (D.C. Cir. 1989)(determining that the appellant's reliance on the Thomas decision was unavailing and noting that the case's correctness has been "called into question"); United States v. Hogan, 122 F. Supp. 2d 358, 369 (E.D.N.Y. 2000) (following Thomas, but commenting that the case "appears to be at odds with *Place*

and *Jacobsen*"); United States v. Sklar, 721 F. Supp. 7, 14 (D Mass. 1989) (observing that a "dwelling-like" expectation of privacy "is not justified when it is asserted with respect to contraband"); People v. Dunn, 77 N.Y.2d 19, 564 N.E.2d 1054, 1056-57, 563 N.Y.S.2d 388 (N.Y. 1990) (holding that canine sniff not a search under the Fourth Amendment); State v. Smith, 327 Ore. 366, 963 P.2d 642, 647 (Or. 1998) (observing that Thomas "would appear to be questionable law"); Rodriguez v. State, 106 S.W.3d 224, 228-29 (Tex. Crim. App. 2003) (same); Porter v. State, 93 S.W.3d 342, 346-47 (Tex. Crim. App. 2002) (same); United States v. Tarazon-Silva, 960 F. Supp. 1152, 1162-63 (W.D. Tex. 1997) (holding that dog sniff of dryer vent of house was not a search).

For example, in Colyer, the Court of Appeals for the District of Columbia challenged Thomas's reasoning:

As an initial matter, the very correctness of the *Thomas* decision is called into question by its assertion that the defendant "had a legitimate expectation that the contents of his closed apartment would remain private." As was shown above, the Supreme Court's analyses in *Place* and *Jacobsen* indicate that a possessor of contraband can maintain no legitimate expectation that its presence will not be revealed. No legitimate expectation of privacy is impinged by governmental conduct that can "reveal nothing about noncontraband items."

Colyer, 878 F.2d at 475 (citations omitted).

In Colyer, the court determined that the canine "sniff of the exterior of an Amtrak roomette" was not a Fourth Amendment search. *Id.* at 473. The opinion emphasized the limited and binary nature of the canine inquiry:

As in *Place*, the driving force behind *Jacobsen* was the recognition that because of the binary nature of the information disclosed by the sniff, no legitimately private information is revealed: That is, "the governmental conduct could reveal nothing about noncontraband items."

. . .

In our view, then, *Place* and *Jacobsen* stand for the proposition that a possessor of contraband can maintain no legitimate expectation that its presence will not be revealed. Stated otherwise, governmental conduct that can "reveal nothing about noncontraband items" interferes with no legitimate privacy expectation.

Id. at 474 (citations omitted).

We should align ourselves with the majority **n7** of courts that have considered the issue and hold "that a sniff by a trained dog, standing where it has a right to be, of odors emanating from any protected place, residence or otherwise, is not a search within the meaning of the Fourth Amendment." Fitzgerald, 837 A.2d at 1035.

n7 Some courts have expressed concern about extending the holding of Place to private residences and have sought to temper it by imposing a requirement that the use of the "canine cannabis connoisseurs" (People v. Dunn, 77 N.Y.2d 19, 564 N.E.2d 1054, 1055, 563 N.Y.S.2d 388 (N.Y. 1990) (quoting 1 LAFAVE, SEARCH AND SEIZURE § 2.2(f), at 367 (2d ed. 1987)) be supported by a reasonable suspicion that contraband is present. See United States v. Whitehead, 849 F.2d 849, 858 (4th Cir. 1988), abrogated on other grounds by Gozlon-Peretz v. United States, 498 U.S. 395, 112 L. Ed. 2d 919, 111 S. Ct. 840 (1991); McGahan v. State, 807 P.2d 506, 509-10 (Alaska

Ct. App. 1991); State v. Ortiz, 257 Neb. 784, 600 N.W.2d 805, 807 (Neb. 1999). Applying these cases, reasonable suspicion existed in this case based on the tip and the discovery of marijuana cultivation magazines and cannabis in Rabb's car.

The majority concludes that Kyllo v. United States, 533 U.S. 27, 150 L. Ed. 2d 94, 121 S. Ct. 2038 (2001) controls the outcome in this case, accepting Rabb's argument that Kyllo has "re-emphasized the sanctity and expectation of privacy of the home."

Kyllo is distinguishable because the investigative technique there at issue was not the limited one so central to the holdings of Place and Jacobsen.

In Kyllo, the police used a thermal imaging device to detect that unusual amounts of heat were being generated inside a home, a "phenomenon that is not itself criminal and could well have had a non-criminal explanation." Fitzgerald, 837 A.2d at 1036. The surveillance device was "a sophisticated piece of technology that revealed information, other than the presence of contraband, about the interior of Kyllo's home." Wilson v. State, 98 S.W.3d 265, 272 (Tex. Crim. App. 2002). As the Supreme Court pointed out, the surveillance device "might disclose . . . at what hour each night the lady of the house takes her daily sauna and bath . . . ." Kyllo, 533 U.S. at 38. The thermal imaging device was not limited to discovering the presence or absence of contraband drugs.

Unlike the Kyllo thermal imaging device, the dog sniff here disclosed only the presence or absence of narcotics; it did not "expose noncontraband items, activity, or information that would otherwise remain hidden from public view." Rodriguez, 106 S.W.3d at 229.

A second distinction between this case and Kyllo is Kyllo's concern with "the advance of technology," the "power of technology to shrink the realm of guaranteed privacy," and "technology [that] is not in general public use." 533 U.S. at 34. Fitzgerald's discussion of this aspect of Kyllo is apposite:

Kyllo's fear was that the failure to prohibit thermal imaging "would leave the homeowner at the mercy of advancing technology--including imaging technology that could discern all human activity in the home." The concern was not so much with present investigative capability but with "more sophisticated systems that are already in use or in development," as *Kyllo* predicted that the "ability to 'see' through walls and other opaque barriers is a clear, and scientifically feasible, goal of law enforcement research and development."

Fitzgerald, 837 A.2d at 1037 (citations omitted).

The canine sense of smell is not the type of rapidly advancing technology that concerned the Supreme Court in Kyllo. As Judge Moylan has observed:

Bloodhounds have been chasing escaping prisoners and other fugitives through the swamps for hundreds of years, with posses following dutifully and trusting implicitly in the canine expertise, even at the closed doors of cabins and houses. The canine reactions, moreover, have traditionally been admissible as evidence even at a trial on the merits, let alone in an ex parte application for a warrant.

The use of the sense of smell generally is a familiar tool of perception much older than the common law or the Bill of Rights. Indeed, Blair v. Commonwealth, 181 Ky. 218, 204 S.W. 67, 68 (Ky. 1918), stated that bloodhound evidence "was looked upon with favor as early as the twelfth century," as it

related a declaration of King Richard I of England (1189-1199), "Dress yonder Marquis [who had stolen the banner of England] in what peacock robes you will, disguise his appearance, alter his complexion with drugs and washes, hide him amidst a hundred men; I will yet pawn my scepter that the hound detects him." It is hardly a new or unfamiliar investigative modality.

Fitzgerald, 837 A.2d at 1037.

Nothing in Kyllo compels the conclusion that Chevy's sniff at the door of the residence was a search under the Fourth Amendment. The court did not recede from Place and Jacobsen.

Finally, the majority opinion directly conflicts with Nelson v. State, 867 So. 2d 534 (Fla. 5th DCA 2004). It attempts to differentiate this case by saying that the hotel corridor in Nelson is a "public area" that is different from the front door accessible to the public in this case. This approach ignores the holdings of Morsman, Haire, Wysong, Koehler, and Detlefson, cited above.

The issuing magistrate properly considered the canine sniff in deciding to issue the warrant. The magistrate had a substantial basis for finding probable cause. This court should reverse the circuit court order suppressing the fruits of the search.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

STATE OF FLORIDA,
Appellant/Petitioner,
vs. CASE NO. 4D02-5139
JAMES RABB, LT. CASE NO. 027671-CF10A
Appellee/Respondent.
_____/

MOTION FOR REHEARING AND REHEARING EN BANC AND/OR CERTIFICATION OF QUESTION OF GREAT PUBLIC IMPORTANCE

COMES NOW Appellant, the State of Florida, by and through undersigned counsel, pursuant to Fla. R. App. P. 9. 330(a), and moves for rehearing and certification of question of great public importance and/or conflict; and pursuant to Fla. R. App. P. 9.331 moves for rehearing *en banc* of this Court's opinion dated June 23, 2004, and, as grounds, states:

I. Under Rule 9.331 of the Florida Rules of Appellate the first category of circumstances under which *en banc* review is usually appropriate is where it is necessary for uniformity, the second category where *en banc* consideration is warranted is where a question of "exceptional importance" is involved.

II. Clearly, the State would assert that this case's outcome contravenes sound and well-established legal principles regarding the binding nature of panel opinions upon later panels considering the same or closely similar issues.

III. The disagreement with previous precedents is highlighted by an interpretation that the front door of

the residence which was on the direct path from the public street is at variance with this Courts previous views and the Florida Supreme Court's view that "one does not harbor an expectation of privacy on a front porch" State v. Morsman, 394 So. 2d 408, 409 (Fla. 1981).

IV. Further, the majority's decision places at odds United States v. Place, 462 U.S. 696, 707 (1983), and this Court's prior determinations that a canine sniff is not a search within the meaning of Fourth Amendment because a dog sniff is limited in scope and method. As such, the confusion in the legal principles thus engendered in this Court opinion quite obvious merit consideration by the full court.

V. In Wysong v. State, 614 So. 2d 670, 671 (Fla. 4th DCA 1993), the investigating police officers came to Wysong's home in order to investigate a tip from an informant that Wysong was growing marijuana on his property. The home was at the end of a dirt road and there were one or more "No Trespassing" signs on the road as well as a "No Trespassing" sign on a tree in front of Wysong's house. The officers saw the signs on the road, but do not remember whether they saw the sign on the tree in front of the house. The officers approached the front door of the home through the unfenced front yard and knocked on the door. The issue then presented was whether the officers' approach to the front door of the home and the knocking on that door constituted an illegal entry. This Court found that it did not. This Court held that there is no reasonable expectation of privacy in the threshold area of the home citing to United States v. Santana, 427 U.S. 38, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976) and Oliver v.

United States, 466 U.S. 170, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984).

VI. Similarly, at bar the officers were not on constitutionally protected ground. However, the majority in the opinion have concluded otherwise holding that "given the shroud of protection wrapped around a house" the space in front of the door enjoyed constitutional protection. This is in direct conflict with this Court's prior decision. As LaFave explains: "[i]t is not objectionable for an officer to come upon that part of the property which 'has been open to common public use.'" Wayne R. LaFave, Search and Seizure § 2.3(e) at 499 (3d Ed. 1996)(citing People v. Superior Court, 33 Cal. App. 3d 475, 109 Cal. Rptr. 106 (1973)).

VII. Moreover, the majority opinion conflicts with this Court's decision in Flowers v. State, 755 So. 2d 708, 710 (Fla. 4th DCA 1999), that held that a sniff by a narcotics detection dog has been held permissible because "its limited scope and method of investigation does not constitute a search." citing Daniels v. Cochran, 654 So. 2d 609, 613 (Fla. 4th DCA 1995), citing United States v. Place, 462 U.S. 696, 707, 103 S. Ct. 2637, 2644, 77 L. Ed. 2d 110, 120-21 (1983).

VIII. Moreover, this case is one of "exceptional importance" warranting *en banc* reconsideration because not only is it conflicting with well established principles it affects a great number of persons in law enforcement concerning matters that is of considerable significance in investigating techniques. The trial court's decision was based upon constitutionally grounds and puts in jeopardy attempts by law enforcement to execute its responsibility to investigate a crime by hampering its ability to use an age old investigative technique that is

severely limited and narrow in scope and only reveals the presence of contraband. The record in this case presents a substantial question concerning the interplay between an individual's privacy rights and law enforcement's ability to investigate crimes. Clearly, this Court's holding will establish a rule of law that will have a significant influence on the administration of justice in this State.

IX. In any event, the reliance on Kyllo v. United States, 533 U.S. 27, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001) and United States v. Thomas, 757 F.2d 1359 (2d Cir. 1985), and distinguishing of United States v. Place, 462 U.S. 696, 707, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983) and United States v. Jacobson, 466 U.S. 109 (1984), speaks to the importance of this court's determining *en banc* whether the panel opinion embodies a constitutionally sound rule in this vital area. Clearly, the panel's decision presented a question of exceptional importance and what the panel determined will certainly have an impact upon the jurisprudence of this circuit and others.

X. Accordingly:

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance, and I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of this court in and that a consideration by the full court is necessary to maintain uniformity of decisions in this court.

1. Wysong v. State, 614 So. 2d 670, 671 (Fla. 4th DCA 1993);

2. Flowers v. State, 755 So. 2d 708, 710 (Fla. 4th DCA 1999)

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XI. As such, the State would respectfully urge the entire Court to rehear the issue *en banc* in light of the above arguments.

XII. Further, the State respectfully requests this panel to reconsider its opinion of June 23, 2004, and having done so, to withdraw that opinion and reverse the lower court's decision granting Appellee's Motion to Suppress as the majority misapprehended and overlooked the following points of law. Fla. R. App. P. 9.330.

XIII. The majority relied on Kyllo, and the allegedly special status of "sense-enhancing technology" where "the technology in question is not in general public use." 533 U.S. at 34-35. With reference to a thermal imaging device used to scan the roof of a building, Kyllo had observed:

> Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion,

the surveillance is a "search" and is presumptively unreasonable without a warrant.

533 U.S. at 40 (emphasis supplied).

XIV. In terms of Fourth Amendment applicability, Kyllo is a case involving the coverage of the place searched, as the majority noted. However, the Court overlooked that this is a case involving the coverage of the police activity, to wit, whether the activity infringed an expectation of privacy that society deems legitimate. The issue of place is distinct from the issue of objectively legitimate expectations and the different varieties of coverage do not mix.

XV. The investigative techniques employed in Kyllo were not limited to discovering the presence or absence of contraband drugs. They detected only circumstantial evidence of crime, not the very gravamen of crime itself. That decision, therefore, does not come within the rationale of Place and Jacobsen. Significantly, Kyllo never even mentions Place or Jacobsen.

XVI. In Kyllo, the thing detected was that unusual amounts of heat were being generated inside the home, a phenomenon that is not itself criminal and could well have had a non-criminal explanation. The surveillance device used was a sophisticated piece of technology that revealed information, other than the presence of contraband, about the interior of Kyllo's home. Here, the dog's sniff did not explore the details of the home; the sniff revealed nothing about the residence other than the presence of cocaine. And, society has determined that one does not have a legitimate expectation in contraband.

XVII. Moreover, the Court misplaced the advance of technology. Historically, the law has drawn no doctrinal distinction between the human and the canine sense of smell. In Johnson v. United States, 333 U.S. 10, 68 S. Ct. 367, 92 L. Ed. 436 (1948), it was human agents who stood outside a hotel room and warrantlessly smelled the "odor of burning opium" emanating from inside the room. That evidence would have been constitutionally unassailable as the basis for the issuance of a search warrant. "If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant. Indeed it might very well be found to be evidence of most persuasive character." 333 U.S. at 13 (emphasis supplied).

XVIII. The Second Circuit characterized the constitutionally parallel situations in United States v. Bronstein, 521 F.2d 459, 461 (2d Cir. 1975):

> If the police officers here had detected the aroma of the drug through their olfactory senses, there could be no serious contention that their sniffing in the area of the bags would be tantamount to an unlawful search. We fail to understand how the detection of the odoriferous drug by the use of the sensitive and schooled canine senses here employed alters the situation and renders the police procedure constitutionally suspect.
>
> (Emphasis supplied).

XIX. Similarly, United States v. Thomas, 787 F. Supp. 663, 684 (E.D. Tex 1992), *aff'd*, 983 F.2d 1062 (5th Cir. 1993), stressed that if the use of the human sense of smell is not a search, neither is the use of the canine sense of smell. In Gadson v. State, 102 Md. App. 554, 558 (1994), the Court opined

> [t]he elementary physics of the olfactory sense, at least in circumstances such as these, is that the dog's nose never intrudes into a constitutionally protected area, such as the appellant's truck. It is rather the case that the dog's nose remains outside, where the dog's nose has a constitutionally unassailable right to be, and that the suspicious and incriminating vapors come wafting out across the public air to meet the dog's nose on the dog's nose's turf. We see no doctrinal difference, be the investigator man or beast, between standing outside and smelling aromas emanating from a truck, on the one hand, and standing outside and hearing sounds resonating from a truck, on the other. In each case, the sensory receptor remains outside where it has a right to be and the stimuli come out to meet it there. If Trooper Prince, while standing outside, had himself detected a suspicious smell escaping from the truck, no one could dispute his entitlement to factor that sensory data into his accumulation of probable cause
>
> (Emphasis supplied).

XX. Additionally, the State would note that in State v. Joyce, 243 Conn. 282, 705 A.2d 181 (1997), *cert. denied*, 523 U.S. 1077, 140 L. Ed. 2d 674, 118 S. Ct.

1523 (1998), the Court in fact distinguished Place, 462 U.S. at 707, because a dog sniff offended no legitimate privacy interest because it was minimally intrusive and detected only the presence or absence of contraband. The Court noted that the search methods employed therein were "quite distinguishable from that of the present case." The case noted that Place turned on the fact that the tests employed detect only the presence of contraband narcotics, and the possession of narcotics is not a "private fact" under the fourth amendment. Rather, it held that the use of a machine designed to detect the presence and identity of many organic compounds by heating clothing items and analyzing the resultant vapors constituted a search because it in fact revealed a multitude of private facts about an individual. See also, State of Connecticut v. Waz, 240 Conn. 365, 383-84; 692 A.2d 1217 (1997)(Majority rejected the defendant's equation of the canine sniff with the use of a vapor machine designed to detect the chemical composition of odors because a dog sniff can only detect the presence of contraband;) Baldi v. Amadon, 2004 DNH 55 (D.N.H., 2004)(The night scope the officer used amplified ambient light but did not assist in any way in seeing the interior of a lighted building as such MacKenzie's night scope is fundamentally different from the thermal imager and did not constitute a search.)

XXI. As an alternative, the State respectfully asks this Court to grant rehearing and to certify a question of great public importance:

whether at the front door of a private residence that is directly accessible from the street, a dog sniff of the odors of contraband emanating from

the residence is a search under the Fourth Amendment.

The undersign expresses a belief, based on a reasoned and studied professional judgment, that this appeal requires immediate resolution by the supreme court and will have a great effect on the administration of justice throughout the state for the same reasons embodied above in support of an *en banc* rehearing

XXII. As well, the State asks this Court to certify conflict with Nelson v. Florida, 867 So. 2d 534 (Fla. 5th DCA 2004), that held a dog sniff of the exterior door of a hotel did not constitute a search within the Fourth Amendment.

WHEREFORE, in light of the foregoing, the undersigned respectfully requests this Court GRANT the State's motion for rehearing, or GRANT rehearing en banc, or GRANT certification of a question of great public importance to the Florida Supreme Court.

Respectfully submitted,
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_____

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Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Motion for Rehearing, Rehearing En Banc, and Certification of Question of Great Public Importance" has been furnished by mail to: CHARLES WENDER, ESQUIRE, Attorney for Appellant, 190 West Palmetto Park Road, Boca Raton, Florida 33432 on this day of July, 2004.

_____

Of Counsel

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

September 22, 2004

CASE NO.: 4D02-5139
L.T. No.: 02-7671 CF 10A

STATE OF FLORIDA v. JAMES RABB

Apellant/Petitioner(s), Appellee/Respondent(s).

BY ORDER OF THE COURT:

ORDERED that appellant's motion filed July 1, 2004, for rehearing and rehearing en banc and/or certification is hereby denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Attorney General-W.P.B. Charles Wender

mg

/s/
MARILYN BEUTTENMULLER, Clerk
Fourth District Court of Appeal

STATE OF FLORIDA, Appellant, v. JAMES RABB, Appellee.

No. 4D02-5139

COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

920 So. 2d 1175; 2006 Fla. App. LEXIS 1902; 31 Fla. L. Weekly D 510

February 15, 2006, Decided

PRIOR HISTORY: Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Ilona M. Holmes, Judge; L.T. Case No. 02-7671CF10A. State v. Rabb, 2005 Fla. App. LEXIS 14430 (Fla. Dist. Ct. App. 4th Dist., Sept. 14, 2005)

COUNSEL: Charles J. Crist, Jr., Attorney General, Tallahassee, and Claudine M. LaFrance, Assistant Attorney General, West Palm Beach, for appellant.

Charles Wender of Charles Wender Attorney-at-Law, Chartered, Boca Raton, for appellee.

JUDGES: GUNTHER, J. FARMER, J., concurs. GROSS, J., dissents with opinion.

OPINION Y: GUNTHER

OPINION:

ON MOTION FOR REHEARING AND REHEARING EN BANC AND/OR CERTIFICATION OF QUESTION OF GREAT PUBLIC IMPORTANCE OF OPINION ON REMAND FROM THE UNITED STATES SUPREME COURT

GUNTHER, J.

We deny the State's motion in all regards. However, we withdraw our previous opinion on remand and substitute the following opinion in its place in order to both incorporate our initial opinion, State v. Rabb, 881 So. 2d 587 (Fla. 4th DCA 2004), clarify portions of that opinion, and address the specific issue on remand from the United States Supreme Court.

The State appeals the trial court order granting James Rabb's **n1** motion to suppress. James Rabb was charged with possession of Alprazolam (Xanex), possession of 3, 4-Methylenedioxymethamphetamine (MDMA), and possession of cannabis (marijuana). Rabb moved to suppress the drugs recovered from his house pursuant to a search warrant. The warrant had been issued based on a probable cause affidavit stating, inter alia: "Based on the information provided by the confidential source, the cultivation of cannabis books and video's located in Mr. Brown's vehicle, the cannabis located in Mr. Brown's vehicle as well as his person and the drug detector dog alert on the residence, your Affiant believes that a cannabis growing operation is located inside the residence." The trial court granted Rabb's motion to suppress. We affirm.

n1 The reader will notice that Rabb was referred to as John Brown in the Affidavit and Application for a Search Warrant. There is no dispute that John Brown is the same individual as James Rabb.Z

The entire Affidavit and Application for a Search Warrant (probable cause affidavit) states:

> On April 19, 2002 a source of information, who requested to remain anonymous, called the Broward Sheriff's Office and stated that a white male subject who was born in 1967, by the name of John Brown had a cannabis grow operation in his residence. The source further explained that the residence is located on Polk Street in Hollywood, behind the Howard Johnson's Hotel.
>
> Your Affiant and Det. Taranu investigated the allegation. A check of the Broward County Property Appraisers Office revealed that John Brown owned a residence on Polk Street in the City of Hollywood, 2839 Polk Street. During the investigation John Browns vehicle, 2011 Pontiac Firebird, Fl tag, LPS485, was observed parked in front of the residence on several occasions.
>
> On April 23, 2002 at approximately 1530 hours, Det. Taranu and your Affiant initiated surveillance on the residence. At 1600 hours a white male, identified as John Brown, exited the residence and entered the 2001 black firebird. Mr. Brown traveled West on Polk Street, cut through the Howard Johnson's parking lot to Hollywood Blvd and entered Interstate 95 North bound. Mr. Brown traveled North on Interstate 95 with Det. Taranu and your Affiant following. During the surveillance Mr. Brown made an improper lane change and

was driving approximately forty miles per hour in a fifty-five mile per hour zone.

At 1610 hours a traffic stop was initiated on Mr. Brown. While Mr. Brown was changing lanes to stop in the outside emergency lane your Affiant observed him placing his hands under the drivers seat and make several overt motions. Once Mr. Brown was stopped he was asked to exit the vehicle for officer safety. While Mr. Brown was exiting the vehicle your Affiant observed two cannabis cultivation books and one cannabis cultivation video on the front drivers seat of the vehicle in plain view. Your Affiant asked Mr. Brown for his drivers license. Mr. Brown was visually nervous, hands trembling while he was locating his license.

Mr. Brown was told that detectives were conducting an investigation and before he was asked any questions your Affiant needed to read him his rights. Mr. Brown was read his rights at which time he understood his rights and agreed to answer questions. Mr. Brown was asked if he had a cannabis grow operation inside the residence. Mr. Brown would not answer the question but stated that he was working inside the residence replacing dry-wall. Your Affiant then asked Mr. Brown about the books and video tape of cannabis cultivation inside the vehicle. Mr. Brown stated that he was just interested in cannabis cultivation.

While I was speaking to Mr. Brown Det. Taranu and his drug detector dog, "Chevy", checked the exterior of the vehicle. Det.

Taranu's drug detector dog alerted to the exterior of the vehicle. The drug detector dog was then placed into the interior of the vehicle and alerted to the ashtray. One cannabis cigarette was recovered from the ashtray which field tested positive.

Your Affiant continued to speak with Mr. Brown who eventually stated that he wished to speak with an attorney. All questioning was terminated. Mr. Brown was advised that he under arrest for possession of cannabis and as detectives were about to place him into a BSO marked unit he stated that he had additional cannabis inside of his left shoe/sock. Two cannabis cigarettes were removed from Mr. Brown's left shoe/sock area. The cannabis field tested positive.

At 1705 hours Det. Taranu and his drug detector dog, "Chevy" walked by the front of the residence. The drug detector dog walked from the public roadway in front of the residence, up to the front door and alerted. The alert was consistent with previous alerts when narcotics were located. Furthermore, Sgt. Damiano and Det. Taranu walked to the front door of the residence and could smell the odor of cannabis emitting from the residence.

Based on the information provided by the confidential source, the cultivation of cannabis books and video's located in Mr. Brown's vehicle, the cannabis located in Mr. Brown's vehicle as well as his person and the drug detector dog alert on the residence, your Affiant

believes that a cannabis growing operation is located inside the residence.

Based on this affidavit, a search warrant was issued for Rabb's house. When law enforcement entered the house, it discovered a cannabis grow operation and sixty-four cannabis plants. Additionally, a safe was discovered containing two MDMA tablets, Alprazolam tablets, and three cannabis cigarettes. The safe also contained a key to one of the grow rooms and Rabb's Social Security card and birth certificate, which presumably identified him as James Rabb and not John Brown. Based on the evidence recovered from Rabb's house, he was charged by information with possession of the controlled substance Alprazolam, possession of the controlled substance MDMA, and possession of cannabis in an amount of twenty grams or less.

Rabb filed a motion to suppress the evidence obtained from his house. He alleged, inter alia, that the evidence supporting the probable cause affidavit was obtained in violation of his "Fourth and Fourteenth Amendment Rights of the United States Constitution, as well as Article I, § 12 of the Florida Bill of Rights." Rabb contended that the anonymous tip regarding his house "set in motion a series of illegal and questionable acts conducted by the Broward Sheriff's Department" including the pretextual traffic stop of his vehicle and "invading [his] privacy rights, by entering onto his [] property with canine assistance and conducting a 'search' of his property." As such, Rabb concluded that without this illegal conduct, there was no probable cause for the issuance of a search warrant for his house.

The State responded to Rabb's arguments by emphasizing the totality of the circumstances: there was an anonymous complaint alleging that marijuana and cannabis were being sold from Rabb's residence; the description of the residence

and its occupant was very detailed; the traffic stop resulted in the discovery of manuals about the harvesting of cannabis; Rabb indicated he had an interest in growing marijuana; and Rabb possessed marijuana on his person. As such, the State contended, even if the drug detector dog search of Rabb's house was not conducted, "everything taken together certainly would provide these detectives with sufficient probable cause" that Rabb was conducting a marijuana grow operation in his house and support the issuance of a search warrant for his house.

The trial court granted the motion to suppress, recognizing that the question presented, "whether it is violative of the Fourth Amendment to conduct a dog sniff of a private residence in order to obtain probable cause for the issuance of a search warrant," was one of first impression in Florida. Considering United States v. Thomas, 757 F.2d 1359 (2d Cir. 1985), as persuasive precedent, the trial court concluded that the use of the dog sniff of Rabb's house amounted to a warrantless search and could not support the issuance of the subsequent search warrant for Rabb's house. The trial court then undertook to determine whether, without the dog sniff of his house, there was sufficient independent and lawfully obtained evidence from the anonymous tip and the traffic stop to establish probable cause to obtain a search warrant for Rabb's house. The trial court concluded that probable cause was lacking where "there was no indicia of a marijuana grow house, i.e., covered windows, high pedestrian traffic, higher than normal use of electricity, etc.," the informant's veracity was not established in the affidavit, and the marijuana in Rabb's car did not establish any illegal activities in his house. The trial court did not address the cannabis cultivation books or video discovered in Rabb's vehicle.

Typically, "the standard of review applicable to a motion to suppress evidence requires that this Court defer to the trial

court's factual findings but review legal conclusions de novo." Backus v. State, 864 So. 2d 1158, 1159 (Fla. 4th DCA 2003)(citing Batson v. State, 847 So. 2d 1149, 1150 (Fla. 4th DCA 2003)). However, where the issuance of a search warrant based on a probable cause affidavit is at issue, the standard of review is not de novo, but rather a standard of "great deference." See United States v. Soderstrand, 412 F.3d 1146, 1152 (10th Cir. 2005). This standard of "great deference" is defined as follows:

> "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of reviewing courts is simply to ensure that the magistrate had a 'substantial basis for . . . concluding' that probable cause existed."

DeLaPaz v. State, 453 So. 2d 445, 446 (Fla. 4th DCA 1984)(quoting Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)); see also Schmitt v. State, 590 So. 2d 404, 409 (Fla. 1991)(same). When so reviewing the issuance of a warrant based on a probable cause affidavit, a court is confined to a consideration of the four corners of the probable cause affidavit. See Schmitt, 590 So. 2d at 409; Brachlow v. State, 907 So. 2d 626, 628 (Fla. 4th DCA 2005). In sum, "although the reviewing court 'should afford a magistrate's probable cause decision great deference,' it should 'not defer if there is no "substantial basis for concluding that probable cause existed."'" United States v. Beck, 139 Fed.Appx. 950, 954 (10th Cir. 2005).

The Gates standard of review of the issuance of a warrant based on a probable cause affidavit centers on three key terms: "probable cause," "fair probability," and "substantial basis." As for probable cause:

> As a legal concept, "probable cause" is not capable of a bright-line test. Rather, it involves a fact-intensive analysis that necessarily varies from context to context. In particular, the courts are required to weigh two interests that usually are in conflict: society's recognition that its police forces should be given discretion to investigate any reasonable probability that a crime has occurred, and the individual's interest in not being subjected to groundless intrusions upon privacy.

Schmitt, 590 So. 2d at 409. Such probable cause exists where the probable cause affidavit "reveals 'a fair probability that contraband or evidence of a crime will be found in a particular place.'" United States v. Syphers, 426 F.3d 461, 464 (1st Cir. 2005)(citation omitted). Concerning this fair probability:

> "'Probability is the touchstone' of this inquiry." United States v. Baldyga, 233 F.3d 674, 683 (1st Cir. 2000) (quoting United States v. Khounsavanh, 113 F.3d 279, 283 (1st Cir. 1997)). Thus, "the standard of probable cause requires a probability, not a prima facie showing, of criminal activity." United States v. Burke, 999 F.2d 596, 599 (1st Cir. 1993); see also United States v. DeQuasie, 373 F.3d 509, 518 (4th Cir. 2004) ("The probable cause standard does not require officials to possess an airtight case before taking action." (internal quotations and citation omitted)).

Syphers, 426 F.3d at 464. The substantial basis supporting a fair probability and probable cause was discussed in Gates:

> Our earlier cases illustrate the limits beyond which a magistrate may not venture in issuing a warrant. A sworn statement of an affiant that "he has cause to suspect and does believe that" liquor illegally brought into the United States is located on certain premises will not do. Nathanson v. United States, 290 U.S. 41, 54 S. Ct. 11, 78 L. Ed. 159 (1933). An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause, and the wholly conclusory statement at issue in Nathanson failed to meet this requirement. An officer's statement that "affiants have received reliable information from a credible person and believe" that heroin is stored in a home, is likewise inadequate. Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964). As in Nathanson, this is a mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause. Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others. In order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued. But when we move beyond the "bare bones" affidavits present in cases such as Nathanson and Aguilar, this area simply does not lend itself to a prescribed set of rules, like that which had developed from Spinelli.

> Instead, the flexible, common-sense standard articulated in Jones, Ventresca, and Brinegar better serves the purposes of the Fourth Amendment's probable cause requirement.

Gates, 462 U.S. at 239.

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Under Article I, Section 12 of the Florida Constitution, the right to be free from unreasonable searches and seizures "shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." However, Article I, Section 12 of the Florida Constitution does not prevent this Court from granting heightened protection in the absence of United States Supreme Court precedent directly on point to the contrary. See Soca v. State, 673 So. 2d 24, 26 (Fla. 1996) ("However, in the absence of a controlling U.S. Supreme Court decision, Florida courts are still 'free to provide its citizens with a higher standard of protection from governmental intrusion than that afforded by the Federal Constitution.'") (citation omitted).

The question emphasized by the parties in this case is whether a dog sniff at the exterior of a house is a search under the Fourth Amendment. In order to be classified as a search, law enforcement conduct must violate a "'constitutionally protected reasonable expectation of privacy.'" California v. Ciraolo, 476 U.S. 207, 211, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986)(quoting Katz v. United States, 389 U.S. 347, 360, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)(Harlan, J., concurring)). Furthermore, as Justice Harlan pointed out in his concurring opinion in Katz: "As the Court's opinion states, 'the Fourth Amendment protects people, not places.' The question,

however, is what protection it affords those people. Generally, as here, the answer to that question requires reference to a 'place.'" Katz, 389 U.S. at 361.

When considering whether law enforcement activity at a house constitutes a search, it is necessary to consider the constitutional protections afforded a house throughout the long history of the Fourth Amendment. At the center of the Fourth Amendment stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Silverman v. United States, 365 U.S. 505, 511, 81 S. Ct. 679, 5 L. Ed. 2d 734 (1961). In fact, "the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" Payton v. New York, 445 U.S. 573, 585-586, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980)(quoting United States v. United States District Court, 407 U.S. 297, 313, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972)). The Fourth Amendment operates to draw "a firm line at the entrance to the house." Payton, 445 U.S. at 589.

Given the shroud of protection wrapped around a house by the Fourth Amendment, we conclude that Kyllo v. United States, 533 U.S. 27, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001), controls the outcome of the case at bar. In Kyllo, law enforcement, believing Kyllo to be growing marijuana in his house, employed an Agema Thermovision 210 thermal imager to scan his house and reveal heat signatures. Id. at 29. The thermal scan revealed that a portion of the roof and one wall of the house were relatively hot compared to the remainder of the house and surrounding houses. Id. at 30. As a result, law enforcement concluded that Kyllo was employing halide lamps to grow marijuana. Id. Combined with further information gathered, law enforcement obtained a warrant and discovered in excess of one hundred marijuana plants in Kyllo's house. Id. Kyllo was charged with manufacturing marijuana and moved to suppress the marijuana evidence seized from his house

based on the use of the thermal imager. Id. The trial court and appellate court determined that use of the thermal imager did not amount to a search of Kyllo's house. Id. at 30-31.

The United States Supreme Court reversed the lower courts, holding:

> We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area," constitutes a search--at least where (as here) the technology in question is not in general public use.

Id. at 34. The Court also noted:

> The Government maintains, however, that the thermal imaging must be upheld because it detected "only heat radiating from the external surface of the house." ... We rejected such a mechanical interpretation of the Fourth Amendment in Katz, where the eavesdropping device picked up only sound waves that reached the exterior of the phone booth. Reversing that approach would leave the homeowner at the mercy of advancing technology--including imaging technology that could discern all human activity in the home. While the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development.

533 U.S. at 35-36. The Court further stated:

> The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained. In Silverman, for example, we made clear that any physical invasion of the structure of the home, "by even a fraction of an inch," was too much, and there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the nonintimate rug on the vestibule floor. In the home, our cases show, *a*ll details are intimate details, because the entire area is held safe from prying government eyes.

Id. at 37 (emphasis in original). The relative warmth of Kyllo's house was deemed one of these intimate details, and it was a Fourth Amendment violation for law enforcement to employ a thermal imager to discern that intimate detail. Id. at 38.

We now turn to the intersection between the staunchly-protected house, as discussed in Kyllo, and law enforcement's use of dog sniffs by trained canines to detect contraband. It is true that the United States Supreme Court held in United States v. Place, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983), that "the particular course of investigation that the agents intended to pursue here--exposure of respondent's luggage, which was located in a public place, to a trained canine--did not constitute a 'search' within the meaning of the Fourth Amendment." Id. at 707. The rationale for the holding is that "the sniff discloses only the presence or absence of narcotics, a contraband item." Id. In Place, the United States Supreme Court was not addressing the use of law enforcement investigatory techniques at a house as in Kyllo, but rather only whether a dog sniff of luggage in a public airport constituted a search under the Fourth

Amendment. The function of "place" in Fourth Amendment jurisprudence was instrumental in the decision in Place.

"Place" is no less key in the case at bar. We are of the view that luggage located in a public airport is quite different from a house, not only in physical attributes, but also in the historical protection granted by law. In United States v. Thomas, 757 F.2d 1359, 1366 (2d Cir. 1985), the Second Circuit compared the dog sniff of luggage in Place with that of an apartment, and concluded that "a practice that is not intrusive in a public airport may be intrusive when employed at a person's home." The rationale for this conclusion is that "the defendant had a legitimate expectation that the contents of his closed apartment would remain private, that they could not be 'sensed' from outside his door. Use of the trained dog impermissibly intruded on that legitimate expectation." Id. 1367.

This logic is no different than that expressed in Kyllo, one of the recent pronouncements by the United States Supreme Court on law enforcement searches of houses. The use of the dog, like the use of a thermal imager, allowed law enforcement to use sense-enhancing technology to intrude into the constitutionally-protected area of Rabb's house, which is reasonably considered a search violative of Rabb's expectation of privacy in his retreat. Likewise, it is of no importance that a dog sniff provides limited information regarding only the presence or absence of contraband, because as in Kyllo, the quality or quantity of information obtained through the search is not the feared injury. Rather, it is the fact that law enforcement endeavored to obtain the information from inside the house at all, or in this case, the fact that a dog's sense of smell crossed the "firm line" of Fourth Amendment protection at the door of Rabb's house. Because the smell of marijuana had its source in Rabb's house, it was an "intimate detail" of that house, no less so than the ambient temperature inside Kyllo's house. Until the United States Supreme Court indicates

otherwise, therefore, we are bound to conclude that the use of a dog sniff to detect contraband inside a house does not pass constitutional muster. The dog sniff at the house in this case constitutes an illegal search.

Next, we briefly address the dissent's attempt to differentiate Kyllo on the basis of the fact that it is concerned with the use of advanced technology by law enforcement. It is true that "the Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing a home on a public thoroughfare." Ciraolo, 476 U.S. at 213. However, the use of enhancement to human senses often entails more than an unshielded glance at a house believed to obtain contraband. The use of dogs for investigation is a longstanding practice, but "the officers' use of a dog is not a mere improvement of their sense of smell, as ordinary eyeglasses improve vision, but is a significant enhancement accomplished by a different, and far superior, sensory instrument." Thomas, 757 F.2d at 1367. Likewise, "thermal imagers detect infrared radiation, which virtually all objects emit but which is not visible to the naked eye." Kyllo, 533 U.S. at 29. Although a drug detector dog's sense of smell may not be man-made, electronic technology, like the Agema Thermovision 210, its use might allow law enforcement to detect that which it otherwise could not detect with unaided human senses. Relying on Kyllo, we conclude that although the use of such sensory enhancement techniques to detect contraband subsequently seized by warrant may not amount to a search in a place such as a public airport, it does when intruding into a house to discern "intimate details." See Payton, 445 U.S. at 586-587 n. 24.

Before turning to the issue of whether there was yet probable cause to support the issuance of a search warrant for Rabb's house based on independent lawful evidence, we address Nelson v. Florida, 867 So. 2d 534 (Fla. 5th DCA 2004). In

Nelson, the defendant checked into a Holiday Inn in Palatka, and the hotel staff reported his presence to law enforcement because he matched a profile of drug dealers who used the hotel as a point of sale. Id. at 535. Law enforcement then used a trained canine to walk the halls of the hotel and perform drug sniffs of each door. Id. The canine alerted to the defendant's door, and law enforcement found cocaine inside the room. Id. The defendant filed a motion to suppress alleging that law enforcement violated the Fourth Amendment by employing "a sensory enhancing animal that was unable to detect contraband until it was within eighteen inches to three feet of the lower door jamb" of the hotel room. Id . The trial court denied the motion and the Fifth District affirmed. Id.

The court's rationale in Nelson is as follows. Despite the fact that hotel rooms are constitutionally-protected areas, individuals do not have a reasonable expectation of privacy in public areas outside a hotel room, such as hallways. Id. (citing Brant v. State, 349 So. 2d 674 (Fla. 2d DCA 1977)). The court then went on to reject the defendant's Fourth Amendment argument and United States v. Thomas, 757 F.2d 1359 (2d Cir. 1985). Nelson, 867 So. 2d at 536-537. In so doing, the court cited federal precedent holding that:

> "The fact that a dog, as odor detector, is more skilled than a human does not render the dog's sniff illegal. Just as evidence in the plain view of an officer may be searched without a warrant, evidence in the plain smell may be detected without a warrant."

Id. at 537 (quoting United States v. Roby, 122 F.3d 1120, 1124-1125 (8th Cir. 1997)(internal citations omitted)).

For two main reasons, we conclude that Nelson neither controls nor conflicts with our decision in this case holding the

dog sniff of Rabb's house to be violative of the Fourth Amendment. First, although we recognize and are in accord with the principle that "the occupants of a hotel room are entitled to the protection of the Fourth Amendment" to much the same degree as occupants of a house, this principle is not without its limitations. See Hoffa v. United States, 385 U.S. 293, 301, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966). As the Fifth Circuit stated in United States v. Jackson, 588 F.2d 1046 (5th Cir. 1979):

> Despite the fact that an individual's Fourth Amendment rights do not evaporate when he rents a motel room, the extent of the privacy he is entitled to reasonably expect may very well diminish. For although a motel room shares many of the attributes of privacy of a home, it also possesses many features which distinguish it from a private residence: "A private home is quite different from a place of business or a motel cabin. A home owner or tenant has the exclusive enjoyment of his home, his garage, his barn or other buildings, and also the area under his home. But a transient occupant of a motel room must share corridors, sidewalks, yards, and trees with the other occupants. Granted that a tenant has standing to protect the room he occupies, there is nevertheless an element of public or shared property in motel surroundings that is entirely lacking in the enjoyment of one's home."

Id. at 1052 (quoting Marullo v. United States, 328 F.2d 361, 363 (5th Cir. 1964)).

Put very simply, a hotel room may be nearly identical to a house for Fourth Amendment purposes, but it is not a house. It

is neither as private nor as sacrosanct. As a result, the fact that the Fifth District held that a trained canine's dog sniff of a hotel room does not violate the Fourth Amendment because the hotel corridor is a public area, does not conflict with our conclusion that the dog sniff of a private house, such as Rabb's, violates the Fourth Amendment. This is so for the same reasons of "place" discussed above when determining that Place is not dispositive of this case, as it addressed public airports rather than private houses.

Second, the distinction between unaided and technologically-enhanced surveillance is not one without a difference as suggested in Nelson. The Fourth Amendment "protects conversations that cannot be heard except by means of artificial enhancement." United States v. Mankani, 738 F.2d 538, 543 (2d Cir. 1984) (citation omitted). The Second Circuit explained the rationale behind this rule:

> The reason for this is evident. The risk of being overheard is a given in modern life, and any time people speak to one another they necessarily assume that risk. "But as soon as electronic surveillance comes into play, the risk changes crucially. There is no security from that kind of eavesdropping, no way of mitigating the risk, and so not even a residuum of true privacy." Absent a warrant, this kind of investigative intrusion bypasses the safeguards of a neutral magistrate's predetermination of probable cause.

Id. at 543 (internal citations omitted).

Because of the similarities highlighted earlier in this opinion between the use of the thermal imager in Kyllo and the dog sniff in Rabb's case, it would be difficult to posit that the

rationale of Mankani does not apply here. The risk of the odors of one's house being smelled by the neighbors may be a "given in modern life," but there is no way to mitigate the risk of using dog sniffs where law enforcement unaided might be unable to smell illegal drugs growing in a house. Just as an individual would never be able to soften his voice enough to mitigate the risk of intrusive surveillance, he would never be able to soften the smells of his house enough to avoid detection by the ultra-sensitive noses of dogs.

To reach any other conclusion recalls the disturbing use of robot-spiders (an emblem blending both the technological advances of Kyllo and the animal senses of Rabb) to detect fugitives who softened their identities by retinal transplantation in Minority Report (Dreamworks 2002), or similar scenarios in virtually any other dystopian science fiction film. After all, the fact that conduct in a house, such as growing marijuana, is not constitutionally protected, does not lessen the Fourth Amendment violation occurring when law enforcement uses sensory enhancement to intrude across the "firm line" at the door of a house and perceive its "intimate details." As a result, the Fifth District's decision in Nelson is neither dispositive nor in conflict.

Although the dissent claims that our analysis of Nelson does not mesh with our conclusion regarding the dog sniff at the door of Rabb's house, we do not believe that there is any inconsistency in our approach. Put simply, we view the reasonable expectation of privacy afforded to locations along a hierarchy from public to private. An airport and a highway are unquestionably public places with little or no privacy, as much as a home is undoubtedly a private place characterized by its very privacy. A hotel room lies somewhere in between, because although it possesses some of the aspects of a home, it also possesses some of the aspects of the itinerant life present in airports and on highways. An individual expects the

public to be readily present in the hallways outside a hotel room door, but an individual does not expect the public to be readily present on the porch outside the door to a home.

It is axiomatic that evidence resulting from an illegal search cannot be the basis of probable cause supporting a subsequent search warrant. See State v. Morsman, 394 So. 2d 408, 410 (Fla.1981)(citing Purcell v. State, 325 So. 2d 83 (Fla. 1st DCA 1976)). Now that we have concluded that law enforcement's use of a drug detector dog at Rabb's door constituted an unreasonable and illegal search, we must consider whether any independent and lawfully obtained evidence establishes a substantial basis for concluding that probable cause existed to support the issuance of a search warrant for Rabb's house. See State v. Hunwick, 434 So. 2d 1000, 1001 (Fla. 4th DCA 1983)("The inclusion of illegally obtained evidence in the supporting affidavit, where the affidavit contains other valid allegations sufficient to establish probable cause, does not invalidate a search warrant. The trial court's duty is to excise the invalid allegations and determine whether the independent and lawfully obtained information demonstrates probable cause.")(internal citations omitted).

The probable cause affidavit listed three other evidentiary bases for probable cause: the information provided by the anonymous source, the cannabis cultivation books and video discovered during the traffic stop of Rabb's vehicle, and the cannabis located in Rabb's vehicle and on his person. The anonymous tip that there was a marijuana grow operation in Rabb's house did not establish a fair probability that illegal activity was occurring in Rabb's house. The tip was unverified because it came from an unknown individual rather than a qualified confidential informant. Nor was it corroborated in the probable cause affidavit by any evidence resulting from surveillance of the house. There was no indicium of the

cultivation of marijuana within, such as covered windows, high pedestrian traffic, or higher than normal use of electricity.

The evidence found during the traffic stop of Rabb's vehicle, including that resulting from an unchallenged dog sniff, also does not provide sufficient probable cause for the search of his house. During the traffic stop, Rabb was found to be in possession of two cannabis cultivation books, one cannabis cultivation video, and a total of three cannabis cigarettes (one in his car and two in his shoe). The possession of a couple of books and a video discussing cannabis cultivation, which in and of itself was perfectly lawful and innocent, and a small amount of marijuana consistent with personal use **n2** simply does not suggest a fair probability of any broader criminal activity, such as the growing of marijuana in Rabb's house. Thus, we agree with the trial court that no independent and lawfully obtained evidence establishes the probable cause necessary to support the issuance of a search warrant for Rabb's house in this case.

n2 See State v. Johnson, 6 Neb. App. 817, 578 N.W.2d 75, 82-83 (Neb. App. 1998)("It has been held that the arrest of a defendant's alleged roommate, pursuant to a vehicle stop, for possession of a large quantity of cocaine on her person did not provide probable cause to search the defendant's residence at a later time. See United States v. Stout, 641 F. Supp. 1074 (N.D.Cal.1986). It has also been held that there was no probable cause for the issuance of a search warrant for a defendant's home based on the defendant's arrest, pursuant to a vehicle stop a few hours earlier, on a drug possession charge, even though cocaine found in the defendant's vehicle was in a quantity greater than for personal use. See Minnesota v. Kahn, 555 N.W.2d 15 (Minn. App. 1996). Compare State v. Godbersen, 493 N.W.2d 852 (Iowa 1992) (holding that where drugs found in car were packaged to indicate person is involved in drug dealing there existed reasonable belief that

person kept drugs, weighing and measuring devices, packaging materials, and profits at residence). It has been observed that if mere probable cause to arrest a suspect also established probable cause to search the suspect's home, there would be no reason to distinguish search warrants from arrest warrants. United States v. Lucarz, 430 F.2d 1051 (9th Cir.1970).").

Considered in totality, neither the anonymous tip nor the fruits of the traffic stop (three cannabis cigarettes, two cannabis cultivation books, and one cannabis cultivation video), provided a substantial basis for concluding that probable cause existed to support the issuance of a search warrant for Rabb's house. Therefore, the issuance of the search warrant for Rabb's house was in error, because the warrant was tainted by the dog sniff of Rabb's house and there was no independent and lawfully obtained evidence that established probable cause to support the issuance of a search warrant for Rabb's house. Consequently, the evidence obtained from the search of Rabb's house was "fruit of the poisonous tree" subject to suppression by the trial court. See Wong Sun v. United States, 371 U.S. 471, 484-485, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

In sum, we hold that the trial court did not err by granting Rabb's motion to suppress where the marijuana seized was discovered by a dog sniff at the exterior of his house. Based on the reasonable expectation of privacy recognized by both law and society to be associated with a house, law enforcement's use of the dog sniff without a warrant constituted a search that was not permitted by the Fourth Amendment. Furthermore, without the dog sniff of Rabb's house, there was no independent and lawfully obtained evidence establishing probable cause to issue a search warrant for Rabb's house. The lack of probable cause and the invalid search warrant irremediably tainted the evidence obtained by the search of Rabb's house. Overall, we conclude that even with great deference afforded to the search warrant for Rabb's house in

this case, the probable cause affidavit did not provide a "substantial basis for concluding that probable cause existed." It included little more than bare conclusions and unfounded assumptions, so as to cross the line from the investigation of crime to the groundless intrusion upon privacy. As a result, we affirm the trial court's order granting the motion to suppress.

However, as directed by the United States Supreme Court on remand of our initial opinion, we engage in further consideration of this case in light of Illinois v. Caballes, 543 U.S. 405, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005). See Florida v. Rabb, 161 L. Ed. 2d 1051, 125 S. Ct. 2246 (2005). In Caballes, the Court was confronted with the question of "whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop." 125 S. Ct. at 837. In reaching its holding that a reasonable, articulable suspicion is not required, the Court reasoned that:

> The use of a well-trained narcotics-detection dog--one that "does not expose noncontraband items that otherwise would remain hidden from public view," Place, 462 U.S., at 707, 103 S. Ct. 2637--during a lawful traffic stop, generally does not implicate legitimate privacy interests. In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement.

Id. at 838. The Court held: "A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment."

Id. Our further consideration does not cause us to retreat from our original conclusion that the trial court's order granting the motion to suppress in this case should be affirmed. In the present case, the focus is not on the legitimacy of the traffic stop of Rabb's vehicle or the ensuing dog sniff of that vehicle, but rather on the subsequent unconstitutional dog sniff of Rabb's house.

Fourth Amendment jurisprudence has not developed in a vacuum, largely because in its protection of people from unreasonable searches and seizures by the government, the degree of protection to be afforded "requires reference to a 'place.'" Katz, 389 U.S. at 361 (Harlan, J., concurring). The answers to Fourth Amendment questions are highly "situation-sensitive," Caballes, 125 S. Ct. at 846 (Ginsburg, J., dissenting), because the situation provides the context necessary to determine whether an individual has a "constitutionally protected reasonable expectation of privacy." See Ciraolo, 476 U.S. at 211. While Fourth Amendment decisions involve a myriad of other factors and guiding principles, it is the place and situation in which they arise that gives direction to judicial analysis.

In the present case, there are significant place and situation differences from Caballes. The challenged dog sniff occurred at the exterior of Rabb's house, the most sacred of places under Fourth Amendment jurisprudence. To repeat, the Fourth Amendment draws "a firm line at the entrance to the house." Payton, 445 U.S. at 589. Caballes, on the other hand, does not involve a house, but rather a vehicle lawfully stopped by law enforcement while traveling along a public interstate highway. 125 S. Ct. at 836. Throughout the history of the Fourth Amendment, vehicles on public roads have not been granted the deference afforded to houses for several reasons: the ready mobility of vehicles, the fact that the interiors of vehicles are generally in plain view of those passing by, and the reality of

"pervasive regulation" of vehicles by government, all of which result in a decreased expectation of privacy. See California v. Carney, 471 U.S. 386, 390-392, 105 S. Ct. 2066, 85 L. Ed. 2d 406 (1985). The case on which Caballes principally relies, United States v. Place, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983), also does not involve a house. Rather, it involves luggage in an airport, another public place. Place, 462 U.S. at 699. Without doubt any protection of luggage in such a public location has been eroded to nearly the point of non-existence in a post-9/11 world. The individual's expectation of privacy could not be more minimal in today's airports with their luggage screenings, passenger scans, and patdown searches.

Juxtaposed against the realities of travel by car and plane, the house stands strong and alone, shrouded in a cloak of Fourth Amendment protection. A house is not movable or on display to the public (at least as far as its interior). The interior of the house is not pervasively regulated by government. If the Fourth Amendment has any meaning at all, a dog sniff at the exterior of a house should not be permitted to uncloak this remaining bastion of privacy, this most sacred of places under Fourth Amendment jurisprudence.

To this end, we re-emphasize our discussion of Kyllo v. United States, 533 U.S. 27, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001). In that discussion, we stress that the nature of what the dog detects--whether phrased as the quality or quantity of information or the presence or absence of contraband--is not the focus of Fourth Amendment concern. The Fourth Amendment concern is that the government endeavored at all to employ sensory-enhancing methods to cross the firm line at the entrance of a house. Id. at 593. Once that line is violated by a dog's nose or a thermal imager, it brings an onslaught of prying government eyes in its wake, and the formerly intimate details of that house become open to public display. This

reality, in which other intimate and fully legal details of an individual's life could be revealed, again sets the present case apart from Caballes and Place. Vehicles on public roadways and luggage in airports are simply different because the privacy to be invaded by government's prying eyes is necessarily limited by the size of the vehicle or bag, plus only the effects of one's traveling life chosen to appear outside the home and in public are at risk of exhibition. Once again, the risks to privacy are greatest at the threshold of the house; what may be tolerable on a public roadway or in an airport may not necessarily be countenanced at home. After all, "in the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes." Kyllo, 533 U.S. at 37. In sum, the distinguishing feature between Kyllo and Caballes is that Kyllo involved a search of a private house, but Caballes involved a search of a vehicle lawfully stopped on a public street. The constitutionally-suspect dog sniff in this case involved the visibly unattainable interior of a private house rather than a vehicle lawfully stopped on a public street, further demonstrating that the outcome of the case at bar is controlled by Kyllo.

The dissent interprets Caballes much like it interprets Place, to stand for the proposition that a binary search, which reveals only the presence or absence of contraband, is never a search for purposes of the Fourth Amendment. This analysis is flawed and disturbing for two reasons. The first reason highlights the fundamental philosophical divide between the majority and the dissent in this case--in order to determine whether a search has occurred, we determine whether the place at which the search occurred was subject to a legitimate expectation of privacy while the dissent measures whether the item searched for was subject to a legitimate expectation of privacy. It is clear from the jurisprudential history of the Fourth Amendment that it is always considered in reference to a place. Furthermore, a slippery slope portends peril for privacy if the item searched

for is the measuring stick. If determining whether law enforcement conduct constitutes a search is solely a function of whether the item searched for is illegal, whether that item be in a vehicle on a public highway or beyond the closed doors of an individual's castle, the Fourth Amendment is rendered meaningless. Nothing would deter law enforcement from marching a dog up to the doors of every house on a street hoping the dog sniffs drugs inside. If drugs are detected, then no search has occurred because there is no legitimate expectation of privacy in drugs and the Fourth Amendment is not implicated; if drugs are not detected, then law enforcement cannot charge the individual with a crime and the unfounded search goes undeterred. Such an "ends justifies the means" approach to the Fourth Amendment is simply not what the Founders intended when they embodied a barrier at the door of the home in the Fourth Amendment. **n3**

n3 In fact, the tension between the majority and dissent is representative of a tension recognized to be at the heart of the recent Fourth Amendment jurisprudence of the United States Supreme Court: "The binary search doctrine of Place and Caballes fits somewhat uncomfortably with Kyllo. Kyllo confirmed that if information is gathered constitutionally, reasonable inferences made from that data are inherently constitutional. Caballes indicates that if the process of inferring reveals only information that is not considered private (particularly evidence of illegal activity), then there are no constitutional limits on the scope of data that can be collected. These two holdings are not mutually exclusive, but neither do they sit perfectly well with one another in spirit." Fourth Amendment--Canine Sniff, 119 Harv. L. Rev. 179, 188 (Nov. 2005).

Second, although we do not dispute the dissent's citation to cases holding that items in the plain sight or plain smell of law enforcement officers on a front porch are not subject to a

legitimate expectation of privacy, such visual or olfactory observation is drastically different from employing sensory-enhancing technology on a front porch to reach through the door of a house to seek knowledge of sights and smells that might otherwise be undetectable to the naked eyes and noses of a human being. This dichotomy has been recognized by courts:

> Generally, one does not have a privacy interest in what is voluntarily exposed to the public. No search occurs, and the protections of [the Fourth Amendment] are not implicated, when a law enforcement officer is able to detect something by using one or more of his senses while lawfully present at a vantage point. The protections of [the Fourth Amendment] are triggered only when a person's private affairs are disturbed or the person's home invaded.

Washington v. Carter, 151 Wn.2d 118, 85 P.3d 887, 890-891 (Wash. 2004).

Furthermore, it is axiomatic that it is law enforcement's responsibility to include the information necessary to demonstrate probable cause in a probable cause affidavit in order to support the issuance of a search warrant. For reasons discussed throughout this opinion, we simply conclude that this case is unlike those cited by the dissent, in part due to insufficiencies in the probable cause affidavit. First, because the chronology of the probable cause affidavit suggests that the dog alert to marijuana occurred prior to law enforcement's detection of its odor, we cannot assume that law enforcement detected the odor of marijuana before the dog alerted as suggested by the dissent. As such, this is not a case in which a law enforcement officer used his senses to detect something within his plain smell; rather, a law enforcement officer used

enhanced, animal senses to detect something inside a home that he might not otherwise have detected. Second, the probable cause affidavit does not support the conclusion that Chevy was trained to detect only contraband. In the probable cause affidavit, Chevy is described as a "drug detector dog" without more. There is no statement that he was "well-trained" or a description of his qualifications, experience, or reliability. **n4** In Caballes, the dog was at least described as a "well-trained narcotics-detection dog," a fact distinguishable from the case at bar. 125 S. Ct. at 838.

n4 Several cases from across the country suggest that such a probable cause affidavit is insufficient and require law enforcement to provide information about the dog's training, experience, and reliability. See, e.g., United States v. Jackson, 2004 WL 1784756, at *3 n.1 (S.D. Ind. 2004)(indicating that sufficiency of probable cause affidavit could be questioned where it provided only "minimal information about the reliability of the dog," including his certification and experience, but not information regarding false positive alerts); Neuhoff v. State, 708 N.E.2d 889, 891 (Ind. Ct. App. 1999)(finding sufficient a probable cause affidavit that included information about the dog's recertification, experience, and specialized training).

Our conclusion that the motion to suppress was properly granted in this case is not a novel departure from the precedent of the United States Supreme Court, by which this Court is bound under Article I, Section 12 of the Florida Constitution, and its legacy of heightened protection of the home. The holdings in Caballes and Place may be based on what the dog detects, but the dog sniffs in those cases occurred in very different places from the house in the present case. The United States Supreme Court has yet to address the intersection of the logic of Caballes and Place with the historical protection of the home and Kyllo. Just as Kyllo did not pass on the

constitutional permissibility of thermal scans of vehicles, Caballes did not pass on the constitutional permissibility of dog sniffs of houses. See Caballes, 543 U.S. 405, 125 S. Ct. 834, 160 L. Ed. 2d 842 (Souter, J., dissenting) ("The Court today does not go so far as to say explicitly that sniff searches by dogs trained to sense contraband always get a free pass under the Fourth Amendment, since it reserves judgment on the constitutional significance of sniffs assumed to be more intrusive than a dog's walk around a stopped car."). **n5** In a "situation-sensitive" Fourth Amendment world, this is all the difference.

n5 What has and has not been addressed by the United States Supreme Court in this regard was summarized in a recent case comment on Caballes: "In its holding, the instant Court avoided the issue of context altogether. By contending that the canine sniff is a nonsearch, there is no need to even analyze whether the expectation of privacy in the vehicle's trunk was one that society was prepared to recognize as reasonable. Making such a cursory distinction, however, may well ignore the potential for abuse of this technique. The Court, therefore, perhaps should have proffered a footnote stating that the majority was expressing no opinion on whether a suspicionless canine sniff would be acceptable in the context of individuals walking down the street, or even at the homestead itself. This is possibly the most profound question yet to be answered by the decision in the instant case: Will the Court apply the analysis of Kyllo to a suspicionless canine sniff of the home in the future, or will it adopt the view of those circuits that have interpreted the setting in Place (a public place) to be irrelevant and have held that a canine sniff is not a search in any context?" **Jeffrey A. Bekares, Case Comment, Constitutional Law: Ratifying Suspicionless Canine Sniffs: Dog Days on the Highways**, 57 Fla. L. Rev. 963, 973-974 (Sept. 2005).

Upon consideration of Caballes, we re-affirm the trial court's order granting Rabb's motion to suppress. In this case, unlike Caballes, the intrusion on privacy expectations does rise to the level of a "constitutionally cognizable infringement." At the end of the analysis, the Fourth Amendment remains decidedly about "place," and when the place at issue is a home, a firm line remains at its entrance blocking the noses of dogs from sniffing government's way into the intimate details of an individual's life. If that line should crumble, one can only fear where future lines will be drawn and where sniffing dogs, or even more intrusive and disturbing sensory-enhancing methods, will be seen next.

Affirmed.

FARMER, J., concurs.

GROSS, J., dissents with opinion.

DISSENT BY: GROSS

DISSENT:

GROSS, J., dissenting.

I dissent from both the court's panel opinion and from the decision to deny rehearing en banc. **n6**

n6 The importance of the composition of the original panel in this case is demonstrated by the vote on whether or not to rehear the case en banc - - six for and six against - - leaving the ruling of the original panel intact.

This court is required by the Florida Constitution to construe the right against unreasonable searches and seizures "in conformity with the 4th Amendment to the United States

Constitution, as interpreted by the United States Supreme Court." Art. I, § 12, Fla. Const. In two cases, the United States Supreme Court has held that dog sniffs of (1) luggage in an airport or (2) of the exterior of a car during a traffic stop are not a search under the Fourth Amendment. This authority compels the conclusion that a dog sniff from another location similarly open to the public is not a search.

The majority's opinion relies primarily on Kyllo v. United States, 533 U.S. 27, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001), to affirm the order granting the motion to suppress. Kyllo did not concern a dog sniff. The majority's constitutional analysis can be boiled down to this: because a house is neither luggage in an airport nor a car by the side of the road, a dog sniff at the front door of a house is a Fourth Amendment search.

Neither of the Supreme Court's dog sniff cases turns on the location of the sniff. Both cases are based on the unique nature of the canine nose.

To adopt the majority's view is to reject Supreme Court precedent and create a novel Fourth Amendment rule that the location of a dog sniff determines its propriety. The Florida Constitution prohibits this type of freewheeling jurisprudence. The United States Supreme Court has never created a residence exception to its Fourth Amendment dog sniff cases. This court's affirmance of the motion to suppress is an example of the humble tail wagging the constitutional dog.

A second problem with the majority opinion is that, in its eagerness to decide the dog sniff issue, the majority has turned up its nose to precedent by refusing to acknowledge that, without the dog sniff, the information supplied to the issuing magistrate in the warrant affidavit provided a substantial basis for concluding that probable cause existed. See Schmitt v. State, 590 So. 2d 404, 409 (Fla. 1991).

The Movement of the Dog and Detectives to the Front Door of the Residence did not Violate the Fourth Amendment

No Fourth Amendment violation occurred when the detectives and the dog went to the front door of Rabb's residence, which was accessible from the street. Based upon a clear line of precedent, the space in front of the door enjoyed no constitutional protection.

The Fourth Amendment does not necessarily protect areas of a home which are "open and exposed to public view." State v. Duhart, 810 So. 2d 972, 973 (Fla. 4th DCA 2002); see also California v. Ciraolo, 476 U.S. 207, 213-14, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986).

Moreover, "one does not harbor an expectation of privacy on a front porch where salesmen or visitors may appear at any time." State v. Morsman, 394 So. 2d 408, 409 (Fla. 1981); see also Fla. Dep't of Agric. & Consumer Servs. v. Haire, 836 So. 2d 1040, 1055 n.7 (Fla. 4th DCA 2003) (noting that an unfenced front yard is generally not considered protected by the Fourth Amendment due to the "lack of expectation of privacy in what is visible to the entire public"); Wysong v. State, 614 So. 2d 670, 671 (Fla. 4th DCA 1993) (finding that an "unfenced front yard was equivalent to an open field through which the officer passed to get to the threshold front door"); Koehler v. State, 444 So. 2d 1032, 1033 (Fla. 1st DCA 1984) (determining that an unenclosed front porch is unprotected by the Fourth Amendment); State v. Detlefson, 335 So. 2d 371, 372 (Fla. 1st DCA 1976) ("It cannot be said that defendant had a reasonable expectation of privacy in the front porch of his home where, presumably, delivery men and others were free to observe the plants thereon.").

Nothing, then, prohibited the detectives from walking up to Rabb's front door. Without violating the Fourth Amendment, a

police officer may approach and knock on a suspect's front door, in an attempt to speak to the suspect. See Potts v. Johnson, 654 So. 2d 596, 599 (Fla. 3d DCA 1995).

Here, the front door of the residence was on a direct path from the public street, about twenty or thirty feet in. As the dog and the detectives stood at the front door, prior to inhaling, there was no constitutional violation.

The Detectives' Detection of the Odor of Cannabis, Combined With Other Factors, Provided a Substantial Basis for Issuing the Warrant, Without Considering the Dog Sniff

Even without considering the dog sniff, there was a sufficient factual basis for the warrant to issue.

According to the warrant affidavit, the drug dog "walked from the public roadway in front of the residence, up to the front door and alerted. . . Furthermore, Sgt. Damiano and Det. Taranu walked to the front door of the residence and could smell the odor of cannabis emitting from the residence."

The majority strains to discredit the fact of the officers' olfactory observations by characterizing the case as one where "a law enforcement officer used enhanced, animal senses to detect something inside a home that he might not otherwise have detected."

There is nothing in the record to support this hypothesis. The affidavit says what it says. At the hearing on the motion to suppress, Detective Taranu was not questioned about what he smelled. He testified that once he "saw the path . . . going from the door to the street" and noticed "the wear and tear on the grass," he "positioned" himself and "pushed the dog towards

the front door, taking the same path any normal person would take to go."

Although the majority has correctly stated the standard of review of a search conducted pursuant to a warrant, it has failed to follow that standard. Courts' after-the-fact scrutiny of a warrant affidavit should not take the form of *de novo* review. See Massachusetts v. Upton, 466 U.S. 727, 732-33, 104 S. Ct. 2085, 80 L. Ed. 2d 721 (1984). As the Supreme court wrote in Upton,

> "A grudging or negative attitude by reviewing courts toward warrants," United States v. Ventresca , 380 U.S. 102, 108, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965), is inconsistent both with the desire to encourage use of the warrant process by police officers and with the recognition that once a warrant has been obtained, intrusion upon interests protected by the Fourth Amendment is less severe than otherwise may be the case.

Id. at 733. The Supreme Court has adopted a deferential standard of review of warrant affidavits, "to further the Fourth Amendment's strong preference for searches conducted pursuant to a warrant." Id. The deferential standard asks whether the magistrate had "a substantial basis for concluding that a search would uncover evidence of wrongdoing." Schmitt, 590 So. 2d at 409.

Under this deferential standard, a reviewing court confines its inquiry "entirely to the four corners of the affidavit." **n7** Id.; Pagan v. State, 830 So. 2d 792, 806 (Fla. 2002). A warrant affidavit should be interpreted in a "common sense [] manner," not a "hypertechnical" one. U.S. v. Ventresca, 380 U.S. 102, 109, 13 L. Ed. 2d 684, 85 S. Ct. 741 (1965).

N7 This is not a case where the defendant contended that the affidavit contained omissions made with intent to deceive or with The Supreme Court has explained the reason for this approach to reviewing warrant affidavits: reckless disregard of whether such information should have been revealed to the magistrate. See Pagan v. State, 830 So. 2d 792, 807 (Fla. 2002).

> The Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

Id. at 108. The job of an appellate court is not to nitpick a warrant affidavit.

Instead of reading the affidavit in a common sense manner, the majority has hypertechnically construed the facts in the light most favorable to its desired result.

Under the correct standard of review, the officers smelled the odor of marijuana on the front step of the home. "Just as evidence in the plain view of officers may be searched without

a warrant, evidence in the plain smell may be detected without a warrant." Nelson v. State, 867 So. 2d 534, 537 (Fla. 5th DCA 2004) (citations omitted). There is no residence exception to the plain view/plain smell doctrine. The plain view doctrine provides that items in plain view in a residence may be seized when "(1) the seizing officer is in a position where he has a legitimate right to be, (2) the incriminating character of the evidence is immediately apparent, and (3) the seizing officer has a lawful right of access to the object." Pagan, 830 So. 2d at 808-09.

The supreme court has held that officers' detection of the odor of "previously burnt marijuana certainly warranted a belief that an offense had been committed" and provided the officers with probable cause to not only stop a vehicle, but to search the entire passenger compartment. State v. Betz, 815 So. 2d 627, 633 (Fla. 2002); see also State v. T.P., 835 So. 2d 1277 (Fla. 4th DCA 2003) (court held that odor of marijuana justified officer's detention and search of defendant and his car); State v. K.V., 821 So. 2d 1127 (Fla. 4th DCA 2002) (same).

The detectives' detection of the odor of marijuana in this case bears similar evidentiary import; "the odor of cannabis emitting from the residence" supported the detectives' belief that the residence contained contraband.

No Florida court has ever held that an officer's smelling of marijuana at the front door of a residence is a Fourth Amendment search that requires a warrant.

In State v. Drysdale, 770 So. 2d 301 (Fla. 4th DCA 2000), an officer responding to a 911 call spoke to the potential victim "at her open front door," where he "noticed the smell of marijuana." We upheld the seizure of marijuana seeds from the living room floor, holding that "where the odor of marijuana was apparent" and the officer observed seeds on the carpet, the

officer was justified in the "belief that the seeds were contraband." Id. at 303. Significantly, we did not hold that the officer's sniff amounted to an unlawful search. See State v. Garcia, 374 So. 2d 601, 602-03 (Fla. 3d DCA 1979) (holding that officers smelling "the odor of marijuana smoke" at the front door of a residence was one factor supporting a finding of probable cause); accord Amburn v. State, 701 So. 2d 568, 569 (Fla. 2d DCA 1997).

Here, the detectives swore in the affidavit that they noticed the "odor of cannabis emitting from the residence." The detectives' noses were hardly the type of "technologically-enhanced surveillance" tool that bothers the majority. The odor of cannabis from a residence has at least the same evidentiary import as the same odor emitting from a car. This was not a case where the warrant issued based on odor alone. When combined with the other factors in the case, there was more than a substantial basis for the magistrate to conclude that probable cause existed. The probable cause equation is: officer's detection of odor of cannabis from residence + anonymous tip that residence contained a "cannabis grow operation" + defendant exiting from residence + cannabis cultivation video and two cannabis cultivation books on driver's seat of defendant's car + recovery of cannabis cigarette from ashtray of defendant's car = probable cause to believe that the residence contained contraband.

The majority's refusal to acknowledge the evidentiary import of the officers' olfactory observation has turned the sense of smell into the stepchild of the senses when it comes to Fourth Amendment analysis. In this district, an officer lawfully at the front door of a residence may act on what he sees, hears, feels, and tastes, but not on what he smells. The officer may not take action based on the smell of smoke, he must wait until he sees the flames. The majority's refusal to take the officers' observation into consideration conflicts with both Drysdale

and Garcia, where the odor of cannabis was a proper factor in the probable cause equation. **n8**

n8 The majority is concerned that the dog alert may have preceded the officers' detection of the odor of marijuana. This is not apparent from either the affidavit or the testimony at the hearing. Even assuming that the dog alert came first, and that it was a search, the officers' almost immediate detection of the same odor would fall under the inevitable discovery doctrine. In Nix v. Williams, 467 U.S. 431, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984), the Supreme Court adopted the "inevitable discovery" exception to the "fruit of the poisonous tree" doctrine. Under this exception, "evidence obtained as the result of unconstitutional police procedure may still be admissible provided the evidence would ultimately have been discovered by legal means." Maulden v. State, 617 So. 2d 298, 301 (Fla.1993). The defendant here did not attack the veracity of the officers' olfactory observation. As was demonstrated above, the officers' presence on the doorstep was not a constitutional violation.

Under United States v. Place, United States v. Jacobsen and Illinois v. Caballes, a Dog Sniff of Contraband is Not a Fourth Amendment Search

Since Chevy stood on constitutionally unprotected ground at the moment of his sniff, the next question is whether the dog's alert to the odor of contraband waffing from the residence constituted a search violative of the Fourth Amendment.

In United States v. Place, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983), the Supreme Court held that a canine sniff of the contents of closed luggage was not a Fourth Amendment "search." The Court wrote:

> The purpose for which respondent's luggage was seized, of course, was to arrange its exposure to a narcotics detection dog. Obviously, if this investigative procedure is itself a search requiring probable cause, the initial seizure of respondent's luggage for the purpose of subjecting it to the sniff test - - no matter how brief - - could not be justified on less than probable cause.

Id. at 706.

The Supreme Court's holding in Place was clear that the canine sniff was not a "search."

> We conclude that the particular course of investigation that the agents intended to pursue here - - exposure of respondent's luggage, which was located in a public place, to a trained canine - - did not constitute a "search" within the meaning of the Fourth Amendment.

Id. at 707.

Central to the Supreme Court's conclusion that a canine sniff was not a search was its uniquely narrow scope:

> [T]he sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. . . .
>
> In these respects, the canine sniff is sui generis. We are aware of no other investigative procedure that is so limited both in the manner

> in which the information is obtained and in the content of the information revealed by the procedure.

Id. The Supreme Court's recognition that a dog sniff is "*sui generis*" renders that investigative technique unique in Fourth Amendment jurisprudence.

The majority misreads Place when it asserts that "the function of 'place' in Fourth Amendment jurisprudence was instrumental in the decision in Place." The majority erroneously suggests that the "feared injury" in this case is that "law enforcement endeavored to obtain information from inside the house at all."

There is no legal distinction between officers in an airport with the suspect's luggage, as in Place, and the officers and dog at the front door of Rabb's residence in this case. The Fourth Amendment did not preclude the officers in either case from being where they were when the canine sniff took place.

Decided a year after Place, United States v. Jacobsen, 466 U.S. 109, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984), provides a fuller rationale for why a narrowly focused investigative technique, one that reveals only the presence or absence of contraband, is not a Fourth Amendment "search."

Jacobsen pointed out that the Fourth Amendment provides protection against "unreasonable searches and seizures." The Supreme Court defined a Fourth Amendment search: a "'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." Id. at 113.

In Jacobsen, government agents had seized some white powder belonging to the defendants. They subjected a sample of the powder to a field test for cocaine. The issue before the

Supreme Court was whether the field test of the defendants' property constituted a "search." The field test infringed on the defendants' subjective expectation of privacy. However, the Supreme Court identified the critical issue as being whether that expectation of privacy was one that "society is prepared to recognize as reasonable." Id at 122. Jacobsen characterized a protected expectation of privacy as one that is "legitimate":

> A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy . . . . It is probably safe to assume that virtually all of the tests conducted under circumstances comparable to those disclosed by this record would result in a positive finding; in such cases, no legitimate interest has been compromised. . . . Congress has decided - - and there is no question about its power to do so - - to treat the interest in "privately" possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine, and no other arguable "private" fact, compromises no legitimate privacy interest.

Id. at 123. The Supreme Court observed that its holding in Jacobsen was "dictated" by its ruling in Place; the Court referred to Place's holding that "a 'sniff test' by a trained narcotics detection dog was not a 'search' within the meaning of the Fourth Amendment." 466 U.S. at 123.

After the holdings of Place and Jacobsen, Florida courts consistently ruled that a canine sniff for contraband does not constitute a Fourth Amendment search. For example, we held that a dog sniff of a vehicle was permissible because "its limited scope and method of investigation does not constitute a search." Flowers v. State, 755 So. 2d 708, 710 (Fla. 4th DCA

1999) (quoting Daniels v. Cochran, 654 So. 2d 609, 613 (Fla. 4th DCA 1995)); Castro v. State, 755 So. 2d 657, 659 (Fla. 4th DCA 1999). "Just as no police officer need close his eyes to contraband in plain view, no police officer armed with a sniff dog need ignore the olfactory essence of illegality." State v. Hill, 770 So. 2d 280, 282 (Fla. 5th DCA 2000). Furthermore, Florida courts have held that a drug dog alert of a vehicle provides probable cause for a search. See Bain v. State, 839 So. 2d 739, 740 (Fla. 4th DCA 2003); Hill, 770 So. 2d at 282; State v. Robinson, 756 So. 2d 249, 250-51 (Fla. 5th DCA 2000).

That Florida ruled correctly on these canine sniff issues became apparent after Illinois v. Caballes, 543 U.S. 405, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005). Caballes did not change the analysis of Place and Jacobsen.

Caballes involved the dog sniff of the exterior of a car during a traffic stop. See Caballes, 125 S. Ct. at 843. The Supreme Court assumed that "the officer conducting the dog sniff had no information about [the defendant] except that he had been stopped for speeding." Id. at 837. The duration of the traffic stop was not longer than the time reasonably required to issue a warning ticket for the speeding infraction. See id.

The Supreme Court held that a "dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment." Id. at 838. The Court reasoned that a well-trained narcotics detection dog will alert only to the presence of contraband, in which there is no legitimate privacy interest, and not to "'noncontraband items that otherwise would remain hidden from public view.'" Id. (quoting Place, 462 U.S. at 699).

The Court distinguished Caballes from Kyllo which involved the use of a thermal-imaging device to detect the growth of marijuana in a home. Crucial in Kyllo "was the fact that the device was capable of detecting lawful activity," unlike a trained dog. Caballes, 125 S. Ct. at 838. Contrary to the majority's contention, Caballes does not turn on the location where a dog sniff occurs.

The majority fails to grasp the importance of the two concepts central to Place, Jacobsen, and Caballes. There is no legitimate expectation of privacy in the odor of contraband; a well-trained dog will alert only to contraband, and not to odors or other things protected by the Fourth Amendment. This is not a case where the defendant challenged the dog's training or experience. **n9** The majority's misunderstanding is evident from the statement that the "dog's sense of smell crossed the 'firm line' of Fourth Amendment protection at the door of Rabb's house." Rather, it was the constitutionally unprotected odor of contraband that crossed the threshold of the home to the dog's nose, which sniffed from a place open to the public.

n9 The majority attempts to distinguish this case from Caballes by complaining that in the warrant affidavit there was neither a "statement" that Chevy was "well-trained," nor a "description" of the dog's "qualifications, experience, or reliability." This hyper-technical reading of the affidavit is improper, imposing a "technical requirement[] of elaborate specificity once exacted under common law pleadings," which, according to the Supreme Court, has "no proper place in this area." Ventresca, 380 U.S. at 108. The affidavit describes "Chevy" as a "drug detector dog." A dog does not obtain this label without training. At the hearing on the motion to suppress, Rabb questioned Detective Tranu about Chevy, revealing the following facts: (1) Chevy was certified; (2) the detective kept a usage log of the times Chevy was asked to make a detection; (3) the dog had been used in hundreds of

investigations in the 12 months preceding the hearing; (4) the dog's "false alerts" were "very minimal;" (5) the dog alerted only to illegal drugs - cocaine, heroin, hashish, and methamphetamines. Rabb did not challenge the skill, training, or competence of the drug detecting dog in the trial court. See State v. Laveroni, 910 So. 2d 333 (Fla. 4th DCA 2005) (describing procedure for challenging qualifications of a narcotics dog); Matheson v. State, 870 So. 2d 8 (Fla. 2d DCA 2003); State v. Foster, 390 So. 2d 469, 470 (Fla. 3d DCA 1980).

The Holding of United States v. Place, Controls This Case Even Though the Dog Sniff Occurred at a Private Residence

The next question is whether this case differs from Place and Caballes because it involves not luggage or a vehicle, but a canine sniff at the front door of Rabb's home.

It is true that individuals are afforded a greater expectation of privacy in their home as compared to a vehicle. See State v. McLeod, 664 So. 2d 983, 985 (Fla. 4th DCA 1995). However, as Judge Charles Moylan has succinctly written:

> The higher level of justification required to satisfy the Fourth Amendment when it applies . . . is not to be confused with the very different issue of whether the amendment applies. Even the enhanced protection of the home is still limited to being a protection against "unreasonable searches and seizures." It is not a protection against non-searches and non-seizures, reasonable or unreasonable.

Fitzgerald v. State, 153 Md. App. 601, 837 A.2d 989, 1030 (Md. Ct. Spec. App. 2003), aff'd, 384 Md. 484, 864 A.2d 1006 (Md. 2004).

Even though Place and Caballes did not involve a dog sniff at a residence, "the rationale of Place and of Jacobsen . . . had absolutely nothing to do with the locus either 1) of where the dog sniffing took place or 2) of where the subjective expectation of privacy was being entertained." Id. As Judge Moylan has observed:

> The *raison d'etre* for treating a dog sniff as a non-search is that the binary nature [*1200] of its inquiry, "contraband 'yea' or 'nay'?," precludes the possibility of infringing any expectation of privacy that society objectively considers to be legitimate. If the possession of narcotics in an automobile or a suitcase is illegitimate, so too is the possession of narcotics in a home. It is the criminal nature of the possession itself that takes the activity out from under the protection of the Fourth Amendment, not the place where the possession occurs.

Id.

The majority and the circuit court relied on United States v. Thomas, 757 F.2d 1359 (2d Cir. 1985), to find the dog sniff was a search under the Fourth Amendment. In Thomas, the second circuit held that a dog sniff of odors emanating from a residential apartment constituted a Fourth Amendment search. The court distinguished Place, reasoning that:

> Here the defendant had a legitimate expectation that the contents of his closed apartment would

> remain private, that they could not be "sensed" from outside his door. Use of the trained dog impermissibly intruded on that legitimate expectation. The Supreme Court in Place found only "that the particular course of investigation that the agents intended to pursue here - - exposure of respondent's luggage, which was located in a public place to a trained canine - - did not constitute a 'search' within the meaning of the Fourth Amendment. Place, 103 S. Ct. at 2644-45. Because of defendant Wheeling's heightened expectation of privacy inside his dwelling, the canine sniff at his door constituted a search.

Thomas, 757 F.2d at 1367.

The problem with Thomas is that it is unsound; the opinion "has met with the universal disapprobation of all the federal circuit and district courts that have considered it." Fitzgerald, 837 A.2d at 1031; See also United States v. Reed, 141 F.3d 644, 649-50 (6th Cir. 1998) (stating that Thomas ignored the Supreme Court's determination in Place that a person has no legitimate expectation of privacy in the possession of contraband, "thus rendering the location of the contraband irrelevant to the Court's holding that a canine sniff does not constitute a search"); United States v. Roby, 122 F.3d 1120, 1125 (8th Cir. 1997) (finding that a dog sniff of a common hotel corridor was not a search); United States v. Lingenfelter, 997 F.2d 632, 639 (9th Cir. 1993) (reasoning that Thomas conflicts with Supreme Court authority and "rests on an incorrect statement of law"); United States v. Colyer, 278 U.S. App. D.C. 367, 878 F.2d 469, 474-76 (D.C. Cir. 1989) (determining that the appellant's reliance of the Thomas decision was unavailing and noting the case's correctness has been "called into question"); United States v. Hogan, 122 F.

Supp. 2d 358, 369 (E.D.N.Y. 2000) (following Thomas, but commenting that the case "appears to be at odds with Place and Jacobsen"); United States v. Sklar, 721 F. Supp. 7, 14 (D. Mass. 1989)(observing that a "dwelling-like" expectation of privacy "is not justified when it is asserted with respect to contraband"); People v. Dunn, 77 N.Y.2d 19, 564 N.E.2d 1054, 1056-57, 563 N.Y.S.2d 388 (N.Y. 1990) (holding that canine sniff is not a search under the Fourth Amendment); State v. Smith, 327 Ore. 366, 963 P.2d 642, 647 (Or. 1988) (observing that Thomas "would appear to be questionable law"); Rodriguez v. State, 106 S.W. 3d 224, 228-29 (Tex. Crim. App. 2003) (same); Porter v. State, 93 S.W. 3d 342, 346-47 (Tex. Crim. App. 2002) (same); United States v. Tarazon-Silva, 960 F. Supp. 1152, 1162-63 (W.D. Tex. 1997) (holding that a dog sniff of the dryer vent of house was not a search).

For example, in Coyler, the Court of Appeals for the District of Columbia challenged Thomas's reasoning:

> As an initial matter, the very correctness of the Thomas decision is called into question by its assertion that the defendant "had a legitimate expectation that the contents of his closed apartment would remain private." As was shown above, the Supreme Court's analyses in Place and Jacobsen indicate that a possessor of contraband can maintain no legitimate expectation that its presence will not be revealed. No legitimate expectation of privacy is impinged by governmental conduct that can "reveal nothing about noncontraband items."

Colyer, 878 F.2d at 475 (citations omitted).

In Colyer, the court determined that the canine "sniff of the exterior of an Amtrak roomette" was not a Fourth Amendment search. Id. at 473. The opinion emphasized the limited and binary nature of the canine inquiry:

> As in Place, the driving force behind Jacobsen was the recognition that because of the binary nature of the information disclosed by the sniff, no legitimately private information is revealed: That is, "the governmental conduct could reveal nothing about noncontraband items."
>
> . . .
>
> In our view, then, Place and Jacobsen stand for the proposition that a possessor of contraband can maintain no legitimate expectation that its presence will not be revealed. Stated otherwise, governmental conduct that can "reveal nothing about noncontraband items" interferes with no legitimate privacy expectation.

Id. at 474 (citations omitted).

We should align ourselves with the majority of courts that have considered the issue and hold "that a sniff by a trained dog, standing where it has a right to be, of odors emanating from any protected place, residence or otherwise, is not a search within the meaning of the Fourth Amendment." Fitzgerald, 837 A.2d at 1035.

The majority concludes that Kyllo controls the outcome in this case, accepting Rabb's argument that Kyllo has "re-emphasized the sanctity and expectation of privacy of the home."

Kyllo is distinguishable because the investigative technique there at issue was not the limited one so central to the holdings of Place, Jacobsen, and Caballes.

In Kyllo, the police used a thermal imaging device to detect that unusual amounts of heat were being generated inside a home, a "phenomenon that is not itself criminal and could well have been a non-criminal explanation." Fitzgerald, 837 A.2d at 1036. The surveillance device was "a sophisticated piece of technology that revealed information, other than the presence of contraband, about the interior of Kyllos' home." Wilson v. State, 98 S.W. 3d 265, 272 (Tex. Crim. App. 2002). As the Supreme Court pointed out, the surveillance device "might disclose . . . at what hour each night the lady of the house takes her daily sauna and bath . . . . " Kyllo, 533 U.S. at 38. The thermal imaging device was not limited to discovering the presence or absence of contraband drugs.

Unlike the Kyllo thermal imaging device, the dog sniff here disclosed only the presence or absence of narcotics; it did not "expose noncontraband items, activity, or information that would otherwise remain hidden from public view." Rodriguez, 106 S.W. 3d at 229.

A second distinction between this case and Kyllo is Kyllo's concern with "the advance of technology," the "power of technology to shrink the realm of guaranteed privacy," and "technology [that] is not in general public use." 533 U.S. at 34. Fitzgerald's discussion of this aspect of Kyllo is apposite:

> Kyllo's fear was that the failure to prohibit thermal imaging "would leave the homeowner at the mercy of advancing technology - - including imaging technology that could discern all human activity in the home." The concern was not so much with present

> investigative capability but with "more sophisticated systems that are already in use or in development," as Kyllo predicted that the "ability to 'see' through walls and other opaque barriers is a clear, and scientifically feasible, goal of law enforcement research and development."

Fitzgerald, 837 A.2d at 1037 (citations omitted).

The canine sense of smell is not the type of rapidly advancing technology that concerned the Supreme Court in Kyllo. As Judge Moylan has observed:

> Bloodhounds have been chasing escaping prisoners and other fugitives through the swamps for hundreds of years, with posses following dutifully and trusting implicitly in the canine expertise, even at the closed doors of cabins and houses. The canine reactions, moreover, have traditionally been admissible as evidence even at a trial on the merits, let alone in an *ex parte* application for a warrant.
>
> The use of the sense of smell generally is a familiar tool of perception much older than the common law or the Bill of Rights. Indeed, Blair v. Commonwealth, 181 Ky. 218, 204 S.W. 67, 68 (Ky. 1918), stated that bloodhound evidence "was looked upon with favor as early as the twelfth century," as it related a declaration of King Richard I of England (1189-1199), "Dress yonder Marquis [who had stolen the banner of England] in what peacock robes you will, disguise his appearance, alter his complexion with drugs and washes, hide him amidst a

> hundred men; I will yet pawn my scepter that the hound detects him." It is hardly a new or unfamiliar investigative modality.

Fitzgerald, 837 A.2d at 1037.

Nothing in Kyllo compels the conclusion that Chevy's sniff at the door of the residence was a search under the Fourth Amendment. The Court did not recede from Place and Jacobsen.

Rather then ride roughshod over precedent, the majority's concern for the privacy of a home is better addressed by holding that a dog sniff alone will not support the issuance of a search warrant for a residence. Such a holding would require law enforcement to discover additional facts, as it did in this case, before a warrant can issue.

Other courts that have expressed concern about extending the holding of Place to private residences have tempered it by imposing a requirement that the use of the "canine cannabis connoisseurs" (People v. Dunn, 77 N.Y.2d 19, 564 N.E.2d 1054, 1055, 563 N.Y.S.2d 388 (N.Y. 1990)(quoting 1 LAFAVE, SEARCH AND SEIZURE § 2.2(f), at 367 (2d ed. 1987)) be supported by a reasonable suspicion that contraband is present. See United States v. Whitehead, 849 F.2d 849, 858 (4th Cir. 1988), abrogated on other grounds by Gozlon-Peretz v. United States, 498 U.S. 395, 111 S. Ct. 840, 112 L. Ed. 2d 919 (1991); McGahan v. State, 807 P.2d 506, 509-10 (Alaska Ct. App. 1991); State v. Ortiz, 257 Neb. 784, 600 N.W.2d 805, 807 (Neb. 1999). Under these cases, reasonable suspicion existed in this case based on the tip, the officers' detection of the odor of cannabis, and the discovery of marijuana cultivation books and cannabis in Rabb's car.

Finally, the majority opinion struggles at length to distinguish Nelson v. State, 867 So. 2d 534 (Fla. 5th DCA 2004). Seven words summarize the majority's reasoning: [*1203] [A] hotel room is not a house. The majority thus avoids conflict by creating an exception to Place and Caballes. However, one has an expectation of privacy in a hotel room similar to that in a home. Both a hotel hallway and front doorstep are open to the public. The dog sniff in each case should be judged by the same standards. No other area of Fourth Amendment law is as schizophrenic as the majority has made this one. What is good for the home should be good for the Hilton.

The issuing magistrate properly considered the canine sniff in deciding to issue the warrant. Even without the dog sniff, a substantial basis for the magistrate's finding of probable cause existed. This court should reverse the circuit court order suppressing the fruits of the search.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

STATE OF FLORIDA,
Appellant/Petitioner,
vs. CASE NO. 4D02-5139
JAMES RABB, LT. CASE NO. 027671-CF10A
Appellee/Respondent.
_____/

MOTION FOR REHEARING AND REHEARING EN BANC AND/OR CERTIFICATION OF QUESTION OF GREAT PUBLIC IMPORTANCE

COMES NOW Appellant, the State of Florida, by and through undersigned counsel, pursuant to Fla. R. App. P. 9. 330(a), and moves for rehearing and certification of question of great public importance and/or conflict; and pursuant to Fla. R. App. P. 9.331 moves for rehearing en banc of this Court's opinion dated September 14, 2005, and, as grounds, states:

1. Under Rule 9.331 of the Florida Rules of Appellate the first category of circumstances under which en banc review is usually appropriate is where it is necessary for uniformity, the second category where en banc consideration is warranted is where there is a question of "exceptional importance" involved.

2. The State would ask this panel to consider an en banc hearing in order to maintain uniformity and to determine a question of "exceptional importance." Further, the State respectfully requests this panel to reconsider its opinion of September 14, 2005, and having done so, to withdraw that opinion and reverse the lower court's decision granting Appellee's Motion to Suppress as the majority misapprehended and

overlooked certain points of law. Fla. R. App. P. 9.330.

3. In a case of first impression, this District Court of Appeals held that a drug-dog sniff of exterior portions of a residence constitutes a search under the Fourth Amendment of the U.S. Constitution.

4. In Florida v. Rabb, 534 U.S. ____, 161 L. Ed. 2d 1051, 125 S. Ct. 2246, 2005 (U.S. 2005,) the United States Supreme Court vacated this Court's prior decision and remanded this case for further consideration in light of Illinois v. Caballas, 543 U.S. ___, 125 S. Ct. 834 (2005).

5. In Caballes, the U.S. Supreme Court held that the use of a well-trained narcotics-detection dog--one that did not expose non-contraband items that otherwise would have remained hidden from public view, generally did not implicate legitimate privacy interests.

6. This Court found that Caballas, *infra*, was distinguishable from the situation at hand and declined to revisit its original conclusion that Kyllo v. United States, 533 U.S. 27 (2001) controlled.

7. This Court reaffirmed appellant's argument that the outside of a residence should be differentiated from other dog sniffs because this type of search "intrudes upon the privacy of the home," and is, therefore, unconstitutional under the Fourth Amendment.

8. In reaffirming its analysis this Court opined that the object, sniffed is the crucial component in determining whether a legitimate privacy interest exists and that the

focus on the scope and nature of the sniff is not the concern.

9. However, the house does not function as a distinction at all. The majority in Caballes opined that the critical component was what was detected.

10. The Caballes Court made clear that the decision in United States v. Place, 462 U.S. 696, 707 (1983), was to be applied as a general categorization, rather than a narrow holding applying only to dog searches of airplane luggage or in public places.

11. The majority of this Court in its opinion recognizes that the holdings in Caballes and Place may be based on what the dog detects, but asserts that the United States Supreme Court has yet to address the intersection of the logic of Caballes and Place with the historical protection of the home and Kyllo citing to Justice Souter's dissent. Caballas, 125 S. Ct. at 842.

12. However, the distinguishing factor of a house versus a vehicle that this Court relied on is misplaced. Explicitly, the majority of the United States Supreme Court opined that the conclusion in Caballes is entirely consistent with Kyllo v. United States, 533 U.S. 27, 150 L. Ed. 2d 94, 121 S. Ct. 2038 (2001), noting that the critical component was what was detected as evidenced by the discussion at oral argument. Caballes, 125 S. Ct. at 838. "[T]he fact that the device was capable of detecting lawful activity--in that case, intimate details in a home, such as 'at what hour each night the lady of the house takes her daily sauna and bath.' Id, citing Kyllo, at 38, 150 L. Ed. 2d 94, 121 S. Ct. 2038. The legitimate expectation that information about perfectly lawful activity will remain private is

categorically distinguishable from respondent's hopes or expectations concerning the non-detection of contraband in the trunk of his car." Id.

13. Implicitly, the United States Supreme Court addressed the distinction between a house and vehicle and rejected such by finding the decisions Caballes and Kyllo consistent. Under this line of reasoning, the distinction the majority of this Court draws between the home and the place cannot be reconciled with the Fourth Amendment rationale of Place and its progeny.

14. It is evident from the United States Supreme Court's opinion in Caballes that the crucial component is the focus on the scope and nature of the sniff rather than on the object sniffed. The underpinnings of the decisions in Caballes and Place is that a canine sniff is not a "search" because both the manner of obtaining information and the information obtained are limited.

15. Further, this Court's reliance on a distinguishing factor the reliability of the dog from Caballes is misplaced. The issue at bar was whether the dog sniff combined with other information, gave the magistrate a substantial basis for finding probable cause to issue a search warrant. Whether there was sufficient proof that the narcotics does was qualified was not raised. Thus, the trial judge never addressed this issue as it was never raised in the motion to suppress. The trial court did not suppress the evidence on that ground.

16. Under Florida Rule of Criminal Procedure 3.190(h)(2), a motion to suppress evidence "shall state clearly the particular evidence sought to be suppressed, the reasons for suppression, and a general statement on which the motion is based." Neither the motion to

suppress, nor the argument presented by defendant at the evidentiary hearing, raised the qualifications of the narcotics dog. Thus, the State was not on notice that this was an issue.

17. As the dissent opines "there was no challenge to the dog's training or experience." Even the majority of this Court recognizes that "the trial court never made a finding that Chevy was reliable or trained to detect only contraband, likely because Rabb did not posit a challenge to Chevy's training and experience as a basis for suppression."

18. In State v. Barber, 301 So. 2d 7, 9 (Fla. 1974), our supreme court stated the following:

> An appellate court must confine itself to a review of only those questions which were before the trial court and upon which a ruling adverse to the appealing party was made. Citation omitted.

19. This Court's passionate opinion exemplifies the importance and growing conflict of opinion as to whether United States v. Place, 462 U.S. 696, 707 (1983), and its progeny has broadened the validity of dog sniffs, when used to detect illegal contraband, to include exterior portions of residences accessible to the public.

20. Other Courts have rejected the invitation to adopt the rationale of the public use standard elaborated by this Court. See, Fitzgerald v. State, 384 Md. 484, 501; 864 A.2d 1006 (Md. 2004). Additionally, in United States v. Reed, 141 F.3d 644, 649-650 (6th Cir., 1998), the Sixth Circuit rejected the rationale that Place, applied

only to "public sniffs." Also, United States v. Lingenfelter, 997 F.2d 632, 638 (9th Cir., 1993), the Ninth Circuit rejected the implied notation that a person has a reasonable expectation that contraband items hidden in his dwelling place would not be revealed. See, also, United States v. Colyer, 278 U.S. App. D.C. 367, 878 F.2d 469, 475-76 (D.C. Cir. 1989); United States v. Sklar, 721 F. Supp. 7, 14 (D. Mass. 1989).

21. This Court's opinion and continued reliance on Kyllo v. United States, 533 U.S. 27, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001) and the distinguishing factor of the home and the greater privacy right its holds speaks volumes as to the importance of this court's determining *en banc* whether the panel opinion embodies a constitutionally sound rule in this vital area. It is quite clear that this panel's decision and dissent presents a question of exceptional importance and certainly has had an impact upon the jurisprudence of this circuit and others.

22. Moreover, there is a conflict between this Court's holdings and the United States Supreme Court's decisions in Place, Jacobsen, and Caballes.

23. As such, the State would respectfully urge the entire Court to rehear the issue en banc in light of the above arguments.

24. I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance, and I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s)

of this court in and that a consideration by the full court is necessary to maintain uniformity of decisions in this court.

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25 As an alternative, the State respectfully asks this Court to grant rehearing and to certify a question of great public importance:

Whether a drug-dog sniff of exterior portions of a residence coupled with other information can support probable cause for a search warrant to issue or is the canine alert an illegal search.

The undersigned expresses a belief, based on a reasoned and studied professional judgment, that this appeal requires immediate resolution by the supreme court and will have a great effect on the administration of justice throughout the state for the same reasons embodied above in support of an en banc rehearing.

WHEREFORE, in light of the foregoing, the undersigned respectfully requests this Court GRANT the State's motion for rehearing, or GRANT rehearing en banc, and/or GRANT certification of a question of great public importance to the Florida Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Motion for Rehearing, Rehearing En Banc, and Certification of Question of Great Public Importance" has been furnished by mail to: CHARLES WENDER, ESQUIRE, Attorney for Appellant, 190 West Palmetto Park Road, Boca Raton, Florida 33432 on this day of September, 2005.

Of Counsel

SUPREME COURT OF FLORIDA

THURSDAY, JUNE 1, 2006

CASE NO.: SCO6-417
Lower Tribunal No.: 4D02-5139

STATE OF FLORIDA vs. JAMES RABB

Petitioner(s) Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

PARIENTE, C.J., and ANSTEAD, LEWIS and QUINCE, JJ., concur.
WELLS, J., dissents

A True Copy
Test:

/s/
Thomas D. Hall
Clerk, Supreme Court

mc
Served:

CLAUDINE M. LAFRANCE
CELIA A TERENZIO
CHARLES WENDER
HON. MARILYN BEUTTENMULLER, CLERK
HON. HOWARD FORMAN, CLERK
HON. ILONA HOLMES, JUDGE

No. 06-309

In The
Supreme Court of the United States

STATE OF FLORIDA,

Petitioner,

vs.

JAMES RABB,

Respondent.

On Petition For Writ Of Certiorari To The Fourth District Court Of Appeal Of The State Of Florida

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the use of a police dog to sniff for illegal drugs at the front entrance of a private residence violate the owner's reasonable expectation of privacy, as guaranteed by the Fourth Amendment of the United States Constitution?

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STATEMENT OF CASE

PROCEDURAL HISTORY

On May 20, 2002 the Respondent, James Rabb, was charged by criminal information for possession of controlled substances – including cannabis. The charges were the result of the issuance and execution of a search warrant of his home located at 2839 Polk Street, Hollywood, Florida. The search and seizure was conducted by detectives from the Broward County Sheriff's Office. The warrant was obtained, in large part, as the result of a dog-sniff alert at the front door of his residence.

The Respondent filed a Motion to Suppress in the Circuit (trial) Court, contending that a police dog sniffing at his front door was a "search" requiring a warrant, and absent a warrant the "search" was illegal. The trial court entered an Order granting the Motion to Suppress, finding that a "sniff" at his front door was an "illegal search" requiring a warrant, and that absent that illegally obtained information there was a lack of independent, legally obtained information to support probable cause. The State appealed.

The Florida Fourth District Court of Appeal affirmed the granting of the Motion to Suppress. *See*, *State v. Rabb*, 881 So.2d 587 (Fla. 4th DCA 2004), with Gross, J., dissenting. The Petitioner's motions for rehearing, rehearing *en banc*, and certification of question of great public importance were denied.

The State petitioned this Court for certiorari review. This Court vacated the District Court's decision and remanded the case for reconsideration in light of *Illinois v.*

Caballes, 543 U.S. 405, 125 S.Ct. 834 (2005); *Florida v. Rabb*, 544 U.S. 1028, 125 S.Ct. 2246 (2005).

On remand, the Fourth District Court of Appeal once again affirmed the granting of the Motion to Suppress. The State then petitioned for rehearing *en banc* and certification of a question of great public importance. The District Court denied the Motion for Rehearing *en banc* and certification, and issued a revised opinion. This now third opinion from the District Court appears as *State v. Rabb*, 920 So.2d 1175 (Fla. 4th DCA 2006). (A.[1] 47-100)

The State then sought leave to invoke the discretionary jurisdiction of the Florida Supreme Court. The Florida Supreme Court declined to hear the case. The Petitioner, State of Florida, now seeks certiorari review before this Court.

STATEMENT OF FACTS

The trial court conducted an evidentiary hearing on the Respondent's Motion to Suppress and made the following findings:

> "On April 23, 2002 Detective Taranu and another detective received information from an anonymous tipster that Defendant was growing marijuana in his home. The tipster gave Defendant's name, year of birth, and stated that he is a white male. The tipster then provided that Defendant's house was located on Polk Street behind the Howard Johnson's.

[1] **A.** = Petitioner's Appendix

> "The detectives located information at the property appraiser's office and went to the address of 2839 Polk Street, in Hollywood, Florida. The officers surveilled the house for about thirty minutes. Defendant exited the house and got into a Firebird that had been parked in the front of the residence. The detectives followed the car and made a traffic stop.
>
> "During the stop, a search of the car was conducted and a small amount of marijuana was located in the car and in Defendant's sock. Defendant also had some books and a videotape of marijuana cultivation in the car.
>
> "Based upon this search, Detective Taranu and his drug detector dog ('Chevy') went to Defendant's residence. Taranu took Chevy to the front door of the residence where the dog alerted. Based upon this conduct, Taranu obtained a search warrant."

In executing the search warrant, law enforcement officers entered the Respondent's home and discovered a cannabis grow operation and sixty-four (64) marijuana plants. Additionally, a safe was discovered which contained a small amount of pills.

The trial court found that Detective Taranu's use of his dog, Chevy, to sniff into Respondent's home amounted to an illegal search. The trial court then examined the other available information contained in the search warrant and determined that, absent the positive dog sniff, there was a lack of probable cause for issuing the warrant. The use of Chevy, the police dog, thus became dispositive in granting the Motion to Suppress.

REASON FOR DENYING WRIT

BECAUSE THE POLICE USED A DOG TO SNIFF INTO A PRIVATE RESIDENCE, THE DISTRICT COURT CORRECTLY SET THIS CASE APART FROM *UNITED STATES V. PLACE*, 462 U.S. 109, 104 S.CT. 1652 (1984) (occurrence at an airport); *ILLINOIS V. CABALLES*, *SUPRA*, AUTOMOBILE ON PUBLIC HIGHWAY, AND *UNITED STATES V. JACOBSEN*, 466 U.S. 109, 104 S.CT. 1652 (1984) (wayland package), AND FOUND A LEGITIMATE EXPECTATION OF PRIVACY CONSISTENT WITH LONG-STANDING PRECEDENT FOUND IN SUCH CASES AS *SILVERMAN V. UNITED STATES*, 365 U.S. 505, 81, S.CT. 679 (1961) AND *PAYTON V. NEW YORK,* 455 U.S. 573, 100 S.CT. 1371 (1980).

Once again, on remand, the Fourth District Court of Appeal had no difficulty in distinguishing between the use of trained police dogs to sniff baggage at an airport (*United States v. Place*, *supra*) or an automobile (*Illinois v. Caballes, supra),* and the use of police dogs to sniff into a private residence. In doing so, the District Court of Appeal referred to the long-standing proposition that one's home is given extraordinary protection under the Fourth Amendment, citing such cases as *Silverman v. United States*, *supra; Payton v. New York*, *supra*; and *United States v. United States District Court*, 407 U.S. 297, 313, 92 S.Ct. 2125 (1972). The District Court of Appeal reasoned that:

> "Given the shroud of protection wrapped around a house by the Fourth Amendment, we conclude that *Kyllo v. United States,* 533 U.S. 27 (2001), controls the outcome of the case at bar." *Rabb, supra* at 591. (A-58)

Thus, contrary to the Petitioner's argument, *United States v. Place*, *supra*, and *United States v. Jacobsen*, *supra*, are not at odds with the District Court's decision, which is grounded in the more recent decision of *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038 (2001).

Kyllo v. United States, supra, gave the District Court the rationale for its decision for finding that a protected "search" occurred. The District Court quoted the following from *Kyllo*, which focused on the sanctity of the home:

> "The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained. In *Silverman*, for example, we made clear that any physical invasion of the structure of the home, 'by even a fraction of an inch', was too much, and there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the non-intimate rug on the vestibule floor. In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes. *Kyllo*, *Id.* at 35-36." *Rabb, supra*, at 592. (A-60)

In finding the sniff by the police dog, "Chevy", at the Respondent's home to be a "search", the District Court (as well as the trial court) also relied on *United States v. Thomas*, 757 F.2d 1359, 1366-67 (2nd Cir. 1985). There, a sniff dog was used at an apartment house. The Second Circuit held that the occupant had a legitimate expectation of privacy – even from a sniffing dog. The Petitioner herein seeks to find conflict between *Thomas* and other cases, such as *United States v. Lingenfelter*, 997 F.2d 632, 638 (9th Cir. 1993) (sniff of commercial warehouse from outside was not a search); *United States v. Reed*, 141 F.3d 644, 650 (6th Cir.

1998) (canine team was already lawfully inside apartment by consent, and "sniff" was not further search); and *United States v. Colyer*, 878 F.2d 469, 475-76 (D.C. Cir. 1989) (sniff of railroad "sleeper" compartment by dog in public corridor was not a search). However, in none of these cases did the court have the benefit of the *Kyllo* decision regarding the use of "sense enhancing" technology outside a private residence. None of these cases concern dog sniffs of an entrance to a private residence.

In finding that a warrantless search did occur, the District Court distinguished *United States v. Place*, *supra*, noting that "*Place* is no less a key in the case at bar". (*Rabb, supra*, at 592.)(A-61) It was of enormous difference to the District Court, and the deciding factor that in *Place*, the encounter occurred in a public airport, and not at their home.

United States v. Jacobsen, *supra*, (a case not mentioned in the majority decision, but championed by the Petitioner), is also not directly at odds with the District Court's decision. *Jacobsen* involved the testing of a suspicious white powder – which was waylaid at a Federal Express facility. A package was damaged, and a white powder spewed forth. Agents of the D.E.A. were called in, and they field-tested the substance for the presence of cocaine. The issue before the court was whether or not the field test was an unlawful "search" and "seizure" within the meaning of the Fourth Amendment.

In *Jacobsen*, the court emphasized that the contraband had initially been seized by non-governmental personnel, and the D.E.A.'s sole involvement was to field test the white powder. The field test was not a "search", as society was not prepared to recognize as "reasonable" a field test of an already seized white powdery substance.

The chemical test did not invoke a privacy interest which was entitled to Fourth Amendment protection. In this case, the privacy interest in one's home does invoke a privacy interest which has been recognized since the founding of the Republic.

The State's reliance on *City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S.Ct. 447 (2000) is curious. There, the City had set up a series of vehicle checkpoints, with the ostensible purpose of ferreting out illegal drugs. In addition to visual observations, K-9 units were employed. The court found these roadblocks to be indistinguishable from the "general interest" in crime control and, thus, violated the Fourth Amendment. As the dissent point out, however, "the State's use of a drug-sniffing dog, according to the court's holding, annuls what is otherwise plainly constitutional under our Fourth Amendment jurisprudence. . . .", 531 U.S. at 48, Rehnquist, C.J., *dissenting*. If the use of drug-sniffing dogs was sufficient to infect an otherwise lawful vehicle stop into an unreasonable one under the Fourth Amendment, then obviously the use of such dogs compromised the occupant's legitimate expectation of privacy.

The most recent decision of *Illinois v. Caballes*, *supra*, is also *not* in direct conflict with the District Court. *Caballes* upheld the use of police sniff dogs during an otherwise valid vehicle stop. While a dog sniffing the trunk of a vehicle lawfully stopped on the roadway "does not rise to the level of a constitutionally cognizable infringement" (*Caballes, supra*), the same should not be said of a dog sniffing at one's front door. Vehicles are subject to special Fourth Amendment rulings. For decades, this Court has acknowledged the special latitude that is given to the police effecting searches and seizures involving motor

vehicles and their occupants. *See*, *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280 (1925); *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975 (1970); *California v. Acevedo*, 500 U.S. 565, 111 S.Ct. 1982 (1991); and *Thornton v. United States*, 541 U.S. 615, 124 S.Ct. 2127 (2004).

One's expectation of privacy in an automobile on the highway is significantly different from the traditional expectation of privacy and freedom in one's residence. *See*, *United States v. Martinez-Fuerte*, 428 U.S. 543, 561, 96 S.Ct. 3074 (1976). This is because "[a]utomobiles, unlike homes, are subjected to pervasive and continuing governmental regulations and controls". *South Dakota v. Opperman*, 428 U.S. 364, 368, 96 S.Ct. 3092 (1976). *See, also, Cardwell v. Lewis*, 417 U.S. 583, 590, 94 S.Ct. 2464 (1974). The relaxed Constitutional protections involving motor vehicles stand in stark contrast to the heightened protections afforded to one's dwelling place.

The District Court did not find *Caballes* in conflict with its holding because of the "significant place and situation differences", and stated:

> The challenged dog sniff occurred at the exterior of Rabb's house, the most sacred of places under Fourth Amendment jurisprudence. To repeat, the Fourth Amendment draws "a firm line at the entrance to the house". *Payton*, 445 U.S. at 589. *Caballes*, on the other hand, does not involve a house, but rather a vehicle lawfully stopped by law enforcement while traveling along a public interstate highway. 125 S.Ct. at 836. Throughout the history of the Fourth Amendment, vehicles on public roads have not been granted the deference afforded to houses for several reasons: The ready mobility of vehicles, the fact that the interiors of vehicles are generally in plain view of

> those passing by, and the reality of "pervasive regulation" of vehicles by government, all of which result in a decreased expectation of privacy. *See, California v. Carney*, 471 U.S. 386, 390-392, 105 S.Ct. 2066, 85 L. Ed.2d 406 (1985). The case on which *Cabailes* principally relies, *United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L. Ed.2d 110 (1983), also does not involve a house. Rather, it involves luggage in an airport, another public place. *Place*, 462 U.S. at 699. Without doubt any protection of luggage in such a public location has been eroded to nearly the point of non-existence in a post-9/11 world. The individual's expectation of privacy could not be more minimal in today's airports with their screenings, passenger scans, and pat-down searches." *State v. Rabb*, supra. (A-71, 72)

The gravamen of the Petitioner's argument is, that since illegal drugs were the subject matter of the police dog's quest, it was irrelevant where the quest took the dog – even at the front door of a private residence. According to the Petitioner, one just does not have, or cannot have, a reasonable recognized expectation of privacy in a home sheltering contraband.

This argument is too simplistic, and ignores the fact that the protection of a home from unreasonable "searches" and "seizures" is a core value of the Fourth Amendment. *See*, *Payton v. New York, supra.* The Fourth District Court of Appeal did not, as Petitioner asserts, misread the rationale behind *United States v. Place, supra*, *United States v. Jacobsen, supra,* and *Illinois v. Caballes, supra*. Rather, it is suggested, the Fourth District correctly read cases such as *Kyllo v. United States, supra, Payton v. New York, supra*, and *Silverman v. United States, supra*, and that it is the Petitioner who is misreading these cases.

The Fourth District Court of Appeal's approach and analysis was correct, and its reasoning was sound:

> " . . . the use of the dog, like the use of a thermal imager, allowed law enforcement to intrude into the constitutionally protected area of Rabb's house, and such reasonably could be considered a search violative of Rabb's expectation of privacy in his retreat. Likewise, it is of no importance that a dog sniff provides limited information, because as in *Kyllo*, the quality or quantity of information obtained through the search is not the feared injury. Rather, it is the fact that law enforcement endeavored to obtain the information at all, or in this case, the fact that a dog's sense of smell crossed the 'firm line' of Fourth Amendment protection at the door of Rabb's house. Because the smell of marijuana had its source in Rabb's house, it was an 'intimate detail' of that house – no less than the relative warmth of Kyllo's house." *Rabb, supra* at 592. (A-61)

CONCLUSION

FOR THE REASONS SUGGESTED ABOVE THE WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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